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CIVIL RIGHTS—CIVIL LIBERTIES

I. POSSIBLE CONSTITUTIONAL LIMITATIONS ON THE USE OF PEN REGISTERS

A. INTRODUCTION

In *Hodge v. Mountain States Telephone & Telegraph Co.*,[1] a customer filed a civil suit against the Mountain States Telephone and Telegraph Company, alleging a number of federal and state claims stemming from the defendant's attachment of a pen register on his telephone. The pen register, which records the numbers dialed on outgoing calls, was attached in connection with an investigation conducted by the defendant telephone company into obscene telephone calls allegedly made by the plaintiff. The plaintiff argued that the actions taken by employees of the defendant in installing the pen register and divulging some of the information recorded by the device violated his rights. He sued asserting three separate federal claims.[2] The United States District Court for the District of Arizona, granted summary judgment in favor of the defendant and the plaintiff appealed. The Ninth Circuit held: 1) information recorded by pen registers is not entitled to fourth amendment protection;[3] 2) the telephone company's use of a pen register in investigating obscene telephone calls does not constitute a violation of Title III of the Omnibus Crime Control and Safe Streets Act of 1968;[4] and 3) The Communications Act of 1934 does not prohibit the use of pen registers nor the divulgence of information obtained by means thereof.[5]

1. 555 F.2d 254 (9th Cir. June, 1977) (per Renfrew, D.J.; the other panel members were Merrill and Hufstedler, JJ.).

2. The three federal claims include those arising under (1) Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510-2520 (1970). Act of June 19, 1968, Pub. L. No. 90-351, Title III, § 802, 82 Stat. 187, *as amended by* Act of January 2, 1971, Pub. L. No. 91-644, Title I, § 101(a), 84 Stat. 1881 (amending § 2516); Act of October 15, 1970, Pub. L. No. 91-452, title I, § 227, 84 Stat. 930 (repealing § 2514, amending §§ 2516 & 2517); Act of July 29, 1970, Pub. L. No. 91-358, Title II, § 211, 84 Stat. 654 (amending §§ 2511, 2518 & 2520); (2) the 1968 amended version of § 605 of the Communications Act of 1934, 47 U.S.C. § 605 (1970); and (3) the fourth amendment to the Constitution of the United States, U.S. CONST., AMEND IV.

3. 555 F.2d at 256.

4. *Id.* at 257.

5. *Id.* at 258.

B. BACKGROUND

The issues presented concerning the pen register and how the various statutes affect its use are highly complex and, as yet, no court has ultimately resolved the questions concerning its regulation.[6] To fully communicate the nature of the problems involved, it will first be necessary to describe how the pen register functions and why it is used. Second, the statutes themselves must be textually and historically examined.

The pen register is a device which can be placed on a telephone line and identify every number dialed from that telephone. It is not capable of recording conversations nor does it identify telephone numbers of incoming callers or indicate whether any call was completed.[7] Since the pen register makes a complete record of all calls made from a specific telephone, it is primarily used by the telephone company to detect billing fraud or defects in telephone service to customers.[8] In recent years, however, it has become popular as a law enforcement tool,[9] and it is frequently used to establish probable cause for installing a full wire tap on a particular suspect's telephone.[10]

The controversy surrounding the use of pen registers involves differences in opinion over the nature of the information retrieved by the pen register. Is it the kind of information which can be

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6. However, the Supreme Court has recently granted *certiorari* in a case involving the use of a pen register. *See* Smith v. Maryland, 23 Cr. L. Rptr. 2417, *cert. granted*, 47 U.S.L.W. 3391 (Dec. 4, 1978) (No. 78-5374). "Question presented: Does installation of pen register . . . without court order or search warrant violate Fourth Amendment?" 47 U.S.L.W. 3416 (12-12-78).

7. *See* United States Order Authorizing the Use of a Pen Register, 538 F.2d 956 (2d Cir. 1976), *rev'd*, 434 U.S. 159 (1977):

> A pen register is a mechanical instrument attached to a telephone line, usually at a central telephone office, which records the outgoing numbers dialed on a particular telephone. In the case of a rotary dial phone, the pen register records on a paper tape dots or dashes equal in number to electrical impulses which correspond to the telephone number dialed. The device is not used to learn or monitor the contents of a call nor does it ever record whether an outgoing call is ever completed. For incoming calls, the pen register records a dash for each ring of the telephone, but does not identify the number of the telephone from which the incoming call originated.

Id. at 957. *See also* United States v. Caplan, 255 F. Supp. 805, 807 (E.D. Mich. 1966).

8. *See* Note, *The Legal Constraints Upon the Use of the Pen Register As a Law Enforcement Tool*, 60 CORNELL L. REV. 1028, 1029 (1975) [hereinafter *Legal Contraints*].

9. *Id.* at 1029.

10. *Id.* at 1030.

characterized as a type of communication?[11] If so, is the intrusion of the pen register an interception of that communication for the purposes of applying certain statutes?[12] And, finally, is the information obtained subject to the protection of an individual's right of privacy as provided by the fourth amendment to the United States Constitution?[13]

Before the passage of The Omnibus Crime Control and Safe Streets Act of 1968, courts relied on section 605 of the Communications Act of 1934 to determine the restraints on the use of pen registers.[14] Included in the Omnibus Act of 1968, was an amend-

11. *See* United States v. Dote, 371 F.2d 176 (7th Cir. 1966).

> The ringing of a telephone may be more than merely a signal indicating a call. Even if a call is not answered, a call at a certain time, or a certain number of rings, or repeated calls may well be a prearranged message or signal. The ringing of a telephone, therefore, may of itself be a communication, and a device, attached to a telephone line, which indicates to a third party that such a communication is taking place or is about to take place intercepts it.

Id. at 181. *See also* United States v. Caplan, 255 F. Supp. 805, 808 (E.D. Mich. 1966).

12. The statutes which possibly apply and which will be subsequently discussed are: the amended version of § 605 of the Communications Act of 1934, 47 U.S.C. § 605 (1976), and Title III of The Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520 (1976).

13. *See* U.S. CONST., amend. IV.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the places to be searched, and the persons or things to be seized.

14. The text of the original § 605 provides:

> Unauthorized publication or use of communications
> No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use

ment to section 605 that eliminated the portion of the second clause of section 605 which dealt with interceptions of wire communications.[15] The intent of The Omnibus Act of 1968 was to take

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the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided,* That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress.

June 19, 1934, c. 652, Title VI, § 605, 48 Stat. 1103.

15. The text of the 1968 amended version of § 605:

Unauthorized publication or use of communications Except as authorized by chapter 119, Title 18, no person receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, (1) to any person other than the addressee, his agent, or attorney, (2) to a person employed or authorized to forward such communication to its destination, (3) to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, (4) to the master of a ship under whom he is serving, (5) in response to a subpoena issued by a court of competent jurisdiction, or (6) on demand of other lawful authority. No person being authorized by the sender shall intercept any radio communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person. No person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by radio and use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto. No person having received any intercepted radio communication or having become acquainted with the contents, substance, purport, effect, or meaning of such communication (or any part thereof) knowing that such communication was intercepted, shall divulge or publish . . . such communication (or any part thereof) or use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto. This section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication which is broadcast or transmitted by amateurs or others for the use of the general public, or which relates to ships in distress.

As amended June 19, 1968, Pub. L. 90-351, Title III, § 803, 82 Stat. 223.

over the control and regulation of all wire surveillance;[16] consequently, the second clause of section 605 was made to apply only to radio communications and the first clause was made subject to conditions set forth in Title III of the 1968 Omnibus Act.[17] Courts which had previously focused on the second clause of section 605 in ruling on the validity of the use of pen registers, now began focusing on the first clause for guidelines.[18] Those courts which did so, however, were virtually always able to find a basis for allowing the use of the pen register within one of the categories of persons listed in clause one to whom the information could be given.[19]

The attempt to regulate pen registers under Title III of the 1968 Omnibus Act has failed as well.[20] Because the Omnibus Act defines "interception" as the "aural acquisition" of a communi-

16. *See* Gelbard v. United States, 408 U.S. 41, 46-52 (1972); United States v. United States Dist. Court, 407 U.S. 297, 301-05 (1972); United States Order Authorizing the Use of a Pen Register or Similar Mechanical Device, 538 F.2d 956, 958 (2d Cir. 1976) *rev'd on other grounds,* 434 U.S. 159 (1977). *See* Note, *Circumventing Title III: The Use of Pen Register Surveillance in Law Enforcement,* 1977 DUKE L.J. 751 [hereinafter *Circumventing Title III*].

17. *See* United States v. Finn, 502 F.2d 938 (7th Cir. 1974). "The first sentence of Section 605 does not apply to Government investigators, but only to persons assisting in receiving or transmitting the communication." *Id.* at 942; United States v. Falcone, 505 F.2d 478 (3rd Cir.), *cert. denied,* 420 U.S. 955 (1974): "Second, the legislative history of the 1968 amendment to Section 605 reveals that Congress intended to shift all control of electronic surveillance operations to 18 U.S.C. § § 2510-2520." *Id.* at 482.

18. *See* United States v. King, 335 F. Supp. 523 (S.D. Cal. 1971), *aff'd in part and rev'd in part on other grounds,* 478 F.2d 494 (9th Cir. 1973), *cert. denied,* 417 U.S. 920 (1974). After the 1968 amendment, the court observed,

> [T]his would serve to remove pen register coverage from the second clause and include it, if at all, within the first clause. This court believes that divulgence on demand of other lawful authority must include disclosure pursuant to a search warrant issued under Rule 41 of the Federal Rules of Criminal Procedure.

335 F. Supp. at 549.

Also, in United States v. Lanza, 341 F. Supp. 405, (M.D. Fla. 1972), the court found it unnecessary to decide if clause one of section 605, as amended, prohibits pen registers as it held that when a pen register was used in conjunction with a court-ordered wiretap, the court-ordered wiretap was sufficient to permit the use of the pen register. *Id.* at 422.

19. *See* United States v. King, 335 F. Supp. at 523-25; United States v. Finn, 502 F.2d at 942-43.

20. One exception to this general rule is that Title III may apply where a court ordered wiretap is also involved. *See* United States v. Lanza, 341 F. Supp at 422, for the purposes of Title III applicability. "[T]he pen register, when used in conjunction with a court-ordered wiretap, is an interception of a wire communication." United States v. Falcone, 505 F.2d at 478. "[W]hen used in conjunction with a wiretap, we conclude that an order permitting interception under Title III for a wiretap provides sufficient authorization for the use of a pen register, and no separate order for the latter is necessary." *Id.* at 482.

cation[21] and the pen register is not capable of making such an acquisition,[22] courts have concluded that use of the pen register is not regulated by Title III of the Omnibus Act.[23] The legislative intent of the Omnibus Act supports this contention.[24]

As a result of the determination that pen registers fall neither under section 605 nor Title III, some courts have held that the regulation of pen registers must necessarily fall under the exclusive protection of the fourth amendment.[25] Other courts, however, have held that issues of privacy[26] are not raised by the use of the pen register and, as a consequence, even the fourth amendment does not apply.[27]

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21. *See* 18 U.S.C. § 2510(4) (1970) which states that " 'intercept' means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device."

22. *See* note 7 *supra.*

23. *See* United States v. Giordano, 416 U.S. 505, 553-54 (1973) (Powell, J., concurring in part and dissenting in part); United States Order Authorizing installation & use of A Pen Register v. Southwestern Bell Telephone Co., 546 F.2d 243, 245 (8th Cir. 1976), *cert. denied,* 434 U.S. 1008 (1978) [hereinafter United States Order]; Application of the United States, 538 F.2d at 958 (2d Cir. 1976); United States v. Illinois Bell Tel. Co., 531 F.2d 809, 811 (7th Cir. 1976); United States v. Clegg, 509 F.2d 605, 610 (5th Cir. 1975); United States v. Falcone, 505 F.2d at 482; United States v. Finn, 502 F.2d at 942; United States v. Brick, 502 F.2d 219, 223 (8th Cir. 1974).

24. S. REP. No. 1097, 90th Cong., 2d Sess. 107, *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 2112, 2178: "The proposed legislation is not designed to prevent the tracing of phone calls. The use of the 'pen register,' for example would be permissible. But see United States v. Dote . . . ."

25. *See* the dissenting opinion of four Justices in United States v. Giordano, 416 U.S. 505 (1974). "Because a pen register device is not subject to the provisions of Title III, the permissibility of its use by law enforcement authorities depends entirely on compliance with the constitutional requirements of the Fourth Amendment." *Id.* at 553-54. *See also* United States Order, 546 F.2d at 245 (8th Cir. 1976); United States v. John, 508 F.2d 1134, 1141 (8th Cir.), *cert. denied,* 421 U.S. 962 (1975).

26. Courts rely on the standard which has evolved from Katz v. United States, 389 U.S. 347 (1967) (Justice Harlan's interpretation of the majority's rule). "[T]here is a two fold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable'." *Id.* at 361.

27. *See* United States v. Clegg, 509 F.2d 605 (5th Cir. 1975), which stated:

> As mentioned, this device (TTS 176 - blue box), which is similar in function to a pen register, notes only the existence (including the time of a call and the number dialed) of telephonic communications. It discloses nothing of the content. The Fourth Amendment, however, protects only the content of a telephone conversation and not the fact that a call was placed or that a particular number was dialed. . . . For this reason, the acquisition by the government by means of a pen register or a TTS 176 of nothing more than information concerning the dates and times of calls placed from a particular telephone and the numbers dialed does not offend the Fourth Amendment.

The general concurrence in the matter is, then, that the amended version of section 605 and Title III do not apply to pen registers, and the fourth amendment may apply only if law enforcement is involved when the pen register is attached. The purpose of this note is to analyze the court's reasoning and to argue, primarily, that the use of pen registers by the telephone company should be subject to the fourth amendment just as government law enforcement is. Further, this note will propose that a first amendment, freedom of speech limitation should be considered by the courts as well.

C. Applicability of the Fourth Amendment

Analysis of the *Hodge* court's opinion with regard to the applicability of the fourth amendment involves four considerations. First, does the pen register record content?[28] Second, does an individual have a reasonable expectation of privacy which attaches to its use, thereby requiring a warrant before the pen register is used? Third, what effect, if any, does government involvement have on fourth amendment applicability when the pen register is used? And, fourth, does the fourth amendment apply to a private entity such as the telephone company, which conducts its own investigation into possible criminal activity?

Is Content Recorded?

With regard to the first consideration, the majority in *Hodge* stated that "the expectation of privacy protected by the fourth amendment attaches to the content of the telephone conversation and not to the fact that a conversation took place . . . . Because a pen register record does not indicate whether the calls placed on the monitored telephone were completed, it does not even establish that 'a conversation took place' "[29] The majority's assumption as to the nature of the pen register recording has not been consistently upheld in the past.[30] Some courts have found

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Id. at 610 (citations omitted). *See also* Korman v. United States, 486 F.2d 926 (7th Cir. 1973).

28. The content referred to consists of the actual dialogue between parties to a telephone conversation. The majority referred to a previous Ninth Circuit case which held, "[T]he expectation of privacy protected by the Fourth Amendment attaches to the content of the telephone conversation and not to the fact that a conversation took place." 555 F.2d at 256, *quoting* United States v. Baxter, 492 F.2d 150, 167 (9th Cir. 1973), *cert. denied*, 416 U.S. 940 (1974).

29. 555 F.2d at 256.

30. *See* United States v. Dote, 371 F.2d 176 (7th Cir. 1966). The court in *Dote* stated:

> The ringing of a telephone may be more than merely a signal

that the pen register does record content. *United States v. Caplan*[31] characterized the ringing of the telephone as a possible pre-arranged signal. The *Caplan* court held that the mere ringing of the telephone possibly communicated a signal to the other party. The signal created by the ringing was therefore considered by the court, to be the content of the communication.[32]

If the particular fact situation in *Hodge* is considered alone, the notion of the pre-arranged signal does not seem applicable. The likelihood of obscene telephone calls sending pre-arranged signals is slim if not ridiculous. However, the possibility that the pen register could be recording a signal thereby recording some content, should be the deciding factor. When a call is placed, whether suspected of being an obscene call or not, there is no way to know if, in fact, it is an obscene call. The possibility always exists, therefore, that the call may be a signal and, as a consequence, may have some characteristics of content.

Neither the majority nor Judge Hufstedler were willing to give pen registers any such characterization.[33] Consequently, according to the opinion, the standard that the fourth amendment protection must attach to content,[34] is not met and, on that basis alone, the fourth amendment can not apply.

Reasonable Expectation of Privacy

Under the second consideration, whether the use of the pen register encroaches on a reasonable expectation of privacy, the majority compared the pen register record to a telephone company billing record and stated that because there is no reasonable expectation of privacy as to billing records, a customer cannot have such an expectation as to a tape made by a pen register.[35]

> indicating a call. Even if a call is not answered, a call at a certain time, or a certain number of rings, or repeated calls may well be a pre-arranged message or signal. The ringing of a telephone, therefore, may of itself be a communication . . . .

Id. at 181. *See also* United States v. Caplan, 255 F. Supp. 805, 808.

31. *Id.*

32. *Id.*

33. The majority did not discuss the possibility. Judge Hufstedler did not discuss the characterization in this part of her opinion. She refered to such cases in her discussion of § 605 but noted that those cases had been diminished in their effect. *See* 555 F.2d at 263-64.

34. If the pen register does record content then the inevitable conclusion is that the fourth amendment must apply.

35. 555 F.2d at 256. *See also* United States v. Baxter, 492 F.2d 150, 167 (9th Cir.

The majority acknowledged that the pen register does record more than billing records,[36] but dismissed this difference as not being of a constitutional dimension. It further stated that pen register records, because they do not indicate whether the calls were completed or not, "are even farther removed than billing records from the content of the communications."[37]

Judge Hufstedler followed similar reasoning. She first stated that while the telephone company does not usually keep a record of local telephone calls, they sometimes do, as a common practice, where a special rate structure is involved.[38] She then concluded that in such cases, there is certainly no reasonable expectation of privacy by the telephone subscribers that a record will not be kept of such calls.[39] In all other cases, she stated, most subscribers do not have a clear understanding of which calls are within their local dialing area and, therefore, do not know which calls are recorded and which are not. As a result, there can be no reasonable expectation of privacy regarding those calls.[40] Her final conclusion as to the applicability of the fourth amendment rested on this portion of her analysis, and, accordingly, she found that pen registers are not covered by the fourth amendment.[41]

Despite Judge Hufstedler's and the majority's reasons for dismissal of the assertion of any reasonable expectation of privacy regarding pen register use, it is conceivable that an individual may not want government agencies to take notice of who that individual calls or how frequently calls are made. Whom one calls and how frequently certain individuals are called can reveal much about an individual's personal activities.[42] As a conse-

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1973), *cert. denied*, 416 U.S. 940 (1974) *citing* United States v. Fithian, 452 F.2d 505, 506 (9th Cir. 1971).

36. 555 F.2d at 256. The majority stated:

> Telephone company billing records show only completed calls, not as with a pen register, the numbers dialed. Furthermore, a pen register record shows the dialing of telephone numbers which, even if completed, would not be shown by billing records, because the numbers are within a local dailing area. It could be argued that since no records of such calls are normally maintained, an expectation of privacy exists.

Id.

37. *Id.* at 257. *See also* United States v. Clegg, 509 F.2d at 610.
38. 555 F.2d at 266. *See also Legal Constraints, supra* note 8, at 1045 n.96.
39. 555 F.2d at 266. *See also* United States v. Clegg, 509 F.2d at 610.
40. 555 F.2d at 266.
41. *Id.* at 267.
42. *See* United States v. Dote, 371 F.2d at 181.

> [W]e cannot pretend that the government, while not hearing

quence, the court's readiness to dismiss such an expectation of privacy is inappropriate.

Government Involvement and the Privacy Issue

Regarding the third consideration, the majority concluded that government involvement would have no effect on the issue of privacy.[43] This conclusion runs counter to several opinions which hold that the fourth amendment applies to pen register use when law enforcement is involved.[44] Judge Hufstedler, on the other hand, claimed that the holding by the majority only applies to the facts of the case. The issue of fourth amendment applicability in all cases is not decided and is therefore left open for a future court to decide.[45] This assumption does not appear to be clearly justified, however, as the majority did decide what the possible effect of the requisite state involvement might be. Its conclusion, stated above, goes much further than merely finding a right in a private enterprise to protect its business. It implies that law enforcement, which is not a private enterprise, and which is generally subject to the fourth amendment constraints, is not subject to them where pen registers are involved. Judge

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> any verbal communication, did not inferentially have a reasonably good notion of the general substantive nature of the communications the pen register indicated were being initiated. In circumstances such as those in this case, knowledge of the existence of the communication is knowledge of its likely character.

Id.

43. 555 F.2d at 256. "Assuming *arguendo* that the requisite state action could be found, it is clear that no substantive Fourth Amendment right of the appellant has been violated by the appellee." *Id.*

44. *See* cases at note 25 *supra*. The general reasoning of these cases is that § 605 and Title III do not regulate pen registers, therefore the only limitation left which can apply is the fourth amendment.

45. 555 F.2d at 267. Judge Hufstedler appears to have contradicted herself in concluding that the applicability of the fourth amendment is not decided in all cases. Earlier in her opinion, she stated that, "the employment of a pen register in the present case does not constitute a search within the meaning of the Fourth Amendment because the 'electronic listening' does not encroach upon 'the privacy upon which [one] justifiably relie[s].' " She went on to state, The pen register "does not disclose the contents of any conversation nor does it indicate whether any calls were completed, [and] [n]o one justifiably could expect that the fact that a particular call was placed will remain his private affair when business records necessarily must contain this information . . . .' Similarly, there is no expectation of privacy in the contents of a pen register tape." *Id.* at 266. All of her statements taken together cannot lead to her conclusion that pen register information may be afforded protection in other cases. If she was correct in finding that there is no expectation of privacy as to the contents of a pen register tape and the fourth amendment applies only to the contents of a communication, then there can never be fourth amendment applicability.

Hufstedler's comments, as a result, are wanting for a more complete analysis on the broader issue.

The Fourth Amendment and Private Acts

The fourth and final consideration, can the fourth amendment apply to a private party *i.e.*, like the telephone company which conducts its own criminal investigations, is discussed only indirectly by the majority.[46] The court stated, quoting from *United States v. Clegg,*[47] that " '[i]t is only when the government has preknowledge of and yet acquiesces in a private party's conducting a search seizure which the government itself . . . could not have undertaken . . . [that the requisite state involvement exists].' "[48] The obvious basis of this statement is that private action alone is not subject to the fourth amendment. It is only when government is involved from the beginning of the investigation that fourth amendment protections may attach. As discussed above, however, the majority did not consider state involvement to be a serious encroachment on individual privacy where the use of the pen register is at issue.

Judge Hufstedler's analysis is similar in content but she refrained from applying the holding any further than the facts in the case.[49] She pointed out that the issue of whether the fourth amendment applies when law enforcement instigates the investigation was not being decided.[50]

Both the majority's and Judge Hufstedler's conclusions that the fourth amendment does not apply to the telephone company, a private party, when it acts on its own initiative are based on abundant authority.[51] The majority, however, overstepped its ob-

46. The majority stated that cooperation alone between appellee's security agents and the local police is not sufficient to establish the requisite state involvement. *Id.* at 256 n.3 It then quoted from *Clegg,* as to government involvement. *Id.*

47. 509 F.2d at 609.

48. 555 F.2d at 256 n.3.

49. *Id.* at 267.

50. *Id.*

51. *See* United States v. Fannon, 556 F.2d 961 (9th Cir. 1977). The *Fannon* court stated:

> In the absence of the requisite governmental sanction—whether by explicit authorization or comparable degree of involvement—searches of cargo by common carriers resulting in the discovery and seizure of contraband which form the basis for subsequent criminal proceedings are private rather than governmental and thus not subject to the strictures of the Fourth Amendment.

ligations in the case by implying that law enforcement involvement would not change the situation. It acknowledged the cases holding otherwise, but appeared to dismiss them as holdings which only apply when a wiretap is also being used.[52] The majority of those cases noted, did involve wiretaps as well,[53] but the statements by the courts in those cases, as to the use of pen registers, indicated that the use of the pen register should be based upon probable cause. The courts found probable cause existed because the wiretap involved was instigated pursuant to a warrant and that same probable cause justifying the warrant, was sufficient to justify use of the pen register as well.

Another group of cases[54] which also considered government involvement to be the crucial factor in determining fourth amendment applicability, as applied to a variety of intrusions, were not considered by the majority or Judge Hufstedler. Cases involving airline and United States Post Office investigations have held that those organizations are subject to the fourth amendment where either the organization was operating under a federal authorization to investigate,[55] as in the cases concerning airline investigations, or, as in a case involving the Post Office, the connection between the government and the organization was found to be so strong that the organization was considered to be an extension of the government.[56] The one decision concerning the telephone company and its use of a "blue box"[57] without direct government involvement, however, held that the telephone company's private status exempted it from fourth amendment con-

Id. at 963. *See also* United States v. Goldstein, 532 F.2d 1305 (9th Cir.), *cert. denied,* 429 U.S. 960 (1976); United States v. Ogden, 485 F.2d 536 (9th Cir. 1973), *cert. denied,* 416 U.S. 987 (1974); United States v. Ellison, 469 F.2d 413 (9th Cir. 1972); Emslie v. State Bar of California, 11 Cal. 3d 210, 520 P.2d 991, 113 Cal. Rptr. 175 (1974); People v. Mahoney, 47 Cal. App. 3d 699, 122 Cal. Rptr. 174 (1975); People v. Cohn, 30 Cal. App. 3d 738, 106 Cal. Rptr. 579 (1973).

52. *See* note 25 *supra.*

53. *Id.*

54. *See* United States v. Fannon, 556 F.2d 961 (9th Cir. 1977); United States v. Canada, 527 F.2d 1374 (9th Cir. 1975), *cert. denied,* 429 U.S. 867 (1976); United States v. Davis, 482 F.2d 893 (9th Cir. 1973); Dyas v. Superior Court, 11 Cal. 3d 628, 522 P.2d 674, 114 Cal. Rptr. 114 (1974); People v. McKinnon, 7 Cal. 3d 899, 500 P.2d 1097, 103 Cal. Rptr. 897 (1972), *cert. denied,* 411 U.S. 931 (1973).

55. *See* United States v. Fannon, 556 F.2d 961 (9th Cir. 1977); United States v. Canada, 527 F.2d 1374, *cert. denied,* 429 U.S. 867 (1976); United States v. Davis, 482 F.2d 895 (9th Cir. 1973).

56. *See* Dyas v. Superior Court of Los Angeles County, 11 Cal. 3d 628, 522 P.2d 674, 114 Cal. Rptr. 114 (1974).

57. See note 27 *supra* for the description of a blue box.

straints.[58] Consequently, although the argument could be made that because the telephone company is in a position to gather information on individuals on a mass scale, as is the Post Office, the courts have not been willing to extend the rationale to include the telephone company when it acts on its own initiative.

Overall, the issue of fourth amendment applicability is not as clear cut as the opinion indicated. Both the majority and Judge Hufstedler made assumptions about the content character of what the pen register records which have not been unanimously assented to,[59] and both have determined that, aside from content, there is no other aspect to consider. They did not consider the effect of implied information described in *United States v. Dote*,[60] which can be obtained by using a pen register and which can be as informative, if not more so, of an individual's activities as that individual's own words.

D. Applicability of Section 605 and Title III of the Omnibus Act of 1968

Analysis of the majority's opinion concerning the applicability of section 605 and Title III is combined because section 605 is currently dependent upon Title III for its meaning. Presently, Title III regulates all wire interceptions[61] and the amended section 605 controls interceptions of radio communications and divulging of the content and existence of radio and wire communications by those assisting in the transmitting and receiving of such communications.[62]

The majority held that neither the amended version of section 605 nor Title III applied to pen registers.[63] Regarding the applicability of section 605, the majority first analyzed the pre-1968 version of section 605 to eliminate the applicability of clause one in the amended 605. After the 1968 amendment, clause one

58. *See* United States v. Goldstein, 532 F.2d 1305 (9th Cir. 1976). The court held that although communications carriers appear to be government agents, they are not. They are private employees and they possess none of the criteria which would make them responsible under the fourth amendment as government bodies are made responsible. *Id.*

59. *See* note 30 *supra*.

60. *See* note 42 *supra*.

61. *See, e.g.*, Gelbard v. United States, 408 U.S. 41, 46-52 (1972); United States v. United States District Court, 407 U.S. 297, 301-05 (1972); United States Order, 538 F.2d 956 (2nd Cir. 1976); S. Rep. No. 1097 90th Cong., 2d Sess., 107, *reprinted in* [1968] U.S. Code Cong. & Admin. News 2112, 2196.

62. *See* note 15 *supra*, for the text of the amended version of § 605.

63. 555 F.2d at 257-58.

remained essentially the same in its text and for that reason, some courts[64] attempted to follow the reasoning of courts such as *Caplan,* a pre-1968 case, which held clause one applicable to pen registers.[65] The majority opinion, however, reasoned as follows: 1) clause one of section 605 applies only to telephone company employees who assist in transmitting or receiving telephone communications;[66] 2) only clause two of the pre-1968 section 605 applies to pen registers because the use of the pen register under section 605 was intended to be an interception and therefore clause one could not apply;[67] and 3) under the pre-1968 version of section 605, there should be no doubt as to the independence of clause one from clause two. In reading the two clauses, clause one would only make sense if it did not apply to interceptions since it specifies certain instances in which a person who transmits or receives wire communications could divulge the contents or existence of a communication, regardless of whether any consent was given. Clause two, on the other hand, prohibits any divulgence of the contents or existence of intercepted wire communications unless one of the parties to the communication consents to such divulgence.[68] The majority concluded its reasoning by stating that the amendment to section 605 in 1968 under Title III ended the applicability of section 605 to wire interceptions. The applicability ended because interception of wire communications was eliminated from clause two of the amended section 605,[69] and Title III

64. *See, e.g.,* Commonwealth v. Coviello, 362 Mass. 722, 291 N.E.2d 416 (1973), which held in a telephone harassing prosecution that the use of a pen register violated clause one. Other courts considered pen registers under clause one, but found particular uses of a pen register before them came within one of the exceptions to clause one enumerated in that clause. *See also* United States v. King, 335 F. Supp. 523, 549 (S.D. Cal. 1971), *aff'd in part and rev'd in part on other grounds,* 478 F 2d 494 (9th Cir. 1973), *cert. denied,* 417 U.S. 920 (1974).

65. The *Caplan* court reasoned that the pen register tape itself could be a communication if the ringing of the telephone was a pre-arranged signal and therefore the divulgence of the pen register tape was divulgence of the communication itself under clause one. 255 F. Supp. at 808.

66. *See* 555 F.2d at 259; United States v. Russo, 250 F. Supp. 55, (E.D. Pa. 1966), the *Russo* court stated:

> Clause 1 prohibits the unauthorized divulgence of the fact of the "existence, contents, substance, purport, effect, or meaning" of a message by anyone assisting in its transmission or reception. This restriction is designed to apply to persons such as telegram or radiogram operators, who must either learn the content of the message or handle a written record of communications in the course of their employment.

Id. at 59.

67. 555 F.2d at 258. *See also* United States v. Dote, 371 F.2d at 181. *See also* United States v. Caplan, 255 F. Supp. 805, 808 (E.D. Mich. 1966).

68. 555 F.2d at 260.

69. *Id.* at 258-59.

was enacted to cover all wire interceptions thereby divesting section 605 of any such control.[70]

Judge Hufstedler's special concurrence criticized the majority opinion for not acknowledging the cases which do not characterize pen register information as an interception.[71] Judge Hufstedler, nevertheless, concluded that the intent of Congress in amending section 605 was to replace the old 605 with the new and in so doing, to permit the use of pen registers.[72] Her criticism must therefore be taken as a technical dispute in terms of giving a complete analysis, for she, herself, suggested that the effect of such cases is now diminished.[73]

Judge Merrill, on the other hand, in his concurrence and dissent, maintained, that the two clauses in the unamended version of section 605 did in fact, overlap, in that clause one was intended to apply to interceptions implicitly while clause two applied explicitly.[74] From this, Judge Merrill concluded that section 605, under clause one of the amended version does prohibit divulgences of information obtainnd by means of a pen register.[75] In so concluding, Judge Merrill has overlooked the significance of the limitation of clause one to persons who assist in the transmitting and receiving of wire communications and the broader terminology, "no persons shall intercept . . ." in clause two.[76] In overlooking such differences, Judge Merrill did not adequately account for the inconsistency which results when one asserts that pen registers are covered by both clauses.[77] As stated in section three of the majority's reasoning, if only clause one is considered,

70. *Id.* at 259. *See also* cases cited at note 61 *supra.*

71. Judge Hufstedler relied primarily on *Caplan.* However, *Caplan* did characterize the operation of a pen register as an interception. That court considered the tape to be a communication itself, therefore, bringing it under clause one as well. *See* 255 F. Supp. at 808. *See also* note 65 *supra* and the cases cited at note 64 *supra.*

72. *See* 555 F.2d at 264 for the discussion in which Judge Hufstedler quotes from the U.S. CODE & ADMIN. NEWS at 2196.

73. *Id.*

74. *Id.* at 267-68.

75. *Id.* at 267.

76. *See* note 15 *supra,* for the text of the amended version of § 605.

77. 555 F.2d at 268, Judge Merrill stated:

> The result is that under old Section 605 divulgence of information obtained by use of a pen register was doubly proscribed by both the first and second clauses; in each case, however, with differing conditions and exceptions. This might have amounted to a degree of redundancy, but I do not find that so objectionable as to justify a strained reading of clause one's straightforward and comprehensive language.

the information obtained by pen registers could be divulged under certain circumstances without the consent of either party but if clause two is also considered, the information obtained could not be divulged unless one of the parties consented. Judge Merrill further attempted to read the portion of the legislative history of the 1968 amendment (stating the new section 605 "is not intended merely to be a reenactment . . . The new provision is intended as a substitute. . . .") as a release of old constraints on clause one imposed by the existence of clause two.[78] His analysis however, was based upon an extremely narrow interpretation of the legislative history. Congress explicitly stated that use of the pen register would be permitted[79] but Judge Merrill chose to ignore that portion of the legislative text. In short, Judge Merrill's analysis suffers from too much selectivity in order to reach his desired result.

In holding that Title III does not apply to pen registers, the majority reasoned that the definition of "interception" as an aural acquisition[80] precludes application of Title III to pen registers[81] and the legislative history of Title III supports the view that Title III was not intended to cover pen registers.[82] Neither Judge Hufstedler nor Judge Merrill offered criticism of the majority's reasoning and conclusion. As a general rule, cases which have decided the applicability of Title III to pen registers (when no court-ordered wire-tap was involved)[83] have followed the majority's analysis. According to all evidence available, that analysis appears to be a correct understanding of the situation.[84]

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78. *Id.* at 268.

79. *See* note 24 *supra.*

80. *See* note 21 *supra.*

81. 555 F.2d at 257.

82. Also, the majority's second point may not be entirely correct. What has become known as the "But see *Dote*" controversy contained in the legislative history evidence quoted in note 24 *supra*, may well be and in fact, has been interpreted by some courts to mean that Title III may cover pen registers when used in conjunction with a court-ordered wiretap. *See Circumventing Title III, supra* note 16, at 752-53. For the purpose of the court's immediate analysis, however, the controversy does not have much relevance as no court ordered wiretap was involved. In any case, to be totally accurate, the opinion should have made some mention of the controversy.

83. *See* United States v. Illinois Bell Tel. Co., 531 F.2d 809 (7th Cir. 1976): "This court and others which have considered the use of the pen register . . . have concluded that its use is not governed by Title III." *Id.* at 812. *See also* United States v. Giordano, 416 U.S. at 553-54; United States v. Clegg, 509 F.2d at 610; United States v. Falcone, 505 F.2d at 482; United States v. Brick, 502 F.2d 219, 223 (8th Cir. 1974); United States v. Finn, 502 F.2d at 942; Korman v. United States, 486 F.2d 926, 931 (7th Cir. 1973).

84. *See* notes 20 & 79 *supra.*

E. Possible Applicability of the First Amendment

One possible restraint on the use of pen registers, which the court neglected to discuss, is that imposed by the first amendment's protection of freedom of speech.[85] The omission of such a discussion is not unusual, however, as no court which has considered the limitations on the use of pen registers, has discussed the possibility of a first amendment limitation.

Despite the apparent unanimous concurrence that the freedom of speech issue has no place in a discussion of pen register use, the courts may be in error for three reasons. First, the fact that no court has considered a first amendment, freedom of speech limitation along with the fourth amendment limitation, goes against a viewpoint held by Justice Douglas who saw the first, fourth and fifth amendments as inextricably tied to one another.[86] Accordingly, when the content of an individual's speech or the existence of that speech is the object of a govern-

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85. U.S. Const. amend I. provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

86. *See* Frank v. Maryland, 359 U.S. 360 (1959) (Douglas, J. dissenting). He stated:

> The Court misreads history when it relates the Fourth Amendment primarily to searches for evidence to be used in criminal prosecutions. That certainly is not the teaching of Entick v. Carrington, 19 Howell's St. TR. col. 1029. At that time—1765—it was the search for the nonconformist that led British officials to ransack private homes. The commands of our First Amendment (as well as the prohibitions of the Fourth and Fifth) reflect the teachings of *Entick v. Carrington*, *supra*. These three amendments are indeed closely related, safeguarding not only privacy and protection against self-incrimination but "conscience and human dignity and freedom of expression as well."

Id. at 375. *See also* United States v. White, 405 F.2d 838 (7th Cir. 1969), *rev'd*, 401 U.S. 745 (1971):

> It is important for courts deciding Fourth Amendment questions to take into account the relationship between that amendment and the First Amendment's penumbrae protection of privacy. It is this nexus which makes a speaker risk analysis appropriate. If the law places great risks of governmental intrusion on an individual's activity, especially his private speech, he will be inhibited in the free expression of his First Amendment rights, that is, the broader the scope of governmental searches and seizures which are determined to be consistent with the Fourth Amendment, the narrower the ambit of protected First Amendment activity will become.

mental search and seizure, as in cases involving the use of a pen register, one should consider all portions of the Constitution which affect the exercise of that speech. Within a search and seizure issue involving an individual's conversation, the first, fourth and fifth amendments are such portions of the Constitution, and consequently the limitations they each impose should be included in such discussions.

Second, consideration of the freedom of speech issue seems highly proper where pen registers are concerned. Because the telephone is a speaking device used frequently by individuals for a variety of communications, any action which would inhibit or have a chilling effect on those communications should be considered as a possible infringement on freedom of speech.[87] The pen register, when attached to a telephone line, is used to gather information about individuals based on the communications in which those individuals engage over the telephone.[88] The act of gathering information which may reveal details of an individual's activities, could inhibit one's use of the telephone and, consequently, impinge on one's exercise of free speech.

And, third, if freedom of speech is not protected where a pen register is used, serious harm can result. As discussed in *United States v. Dote,*[89] by recording the existence of communications through the use of a pen register, the government or the telephone company, can infer the general substantive nature of those communications, even though the actual verbal communications are not heard. For example, by knowing the numbers dialed by an individual from his telephone, the telephone company or the government can determine the identities of all persons or organizations called, thereby establishing certain social, political or business patterns of that individual.[90] Through the monitoring of an individual's social contacts, any personal conviction or political philosophy can be determined, scrutinized and discriminated against according to the views and sympathies of the particular group in political power at the time. The harm[91] that can result to individuals in this type of situation is uncontrollable,

87. *Id.* at 845 n.8. See a discussion of the "chilling effect" test in Note, *First Amendment Suits Against Governmental Surveillance: Getting Beyond the Justiciability Threshold*, 20 ST. LOUIS U.L. REV. 692-721 (1976).

88. *See Legal Constraints, supra* note 8, at 1029-30.

89. 371 F.2d 176, 181 (7th Cir. 1966). *See* note 42 *supra,* for text of quote.

90. See discussion of how the pen register functions in subsection B. of this Note.

91. *See* B. Bernstein, *The Road to Watergate and Beyond: The Growth and Abuse of Executive Authority Since 1940,* 40 LAW AND CONTEMP. PROB. 58, 58-86 (1976).

and, for that reason should not be tolerated in a society which holds itself out to the world as a protector of individual freedoms.

In summary, the first amendment is involved because: 1) a consideration of the fourth amendment often demands consideration of first and fifth amendment limitations as well; 2) a pen register can inhibit an individual's freedom of speech; and 3) serious harm may result if freedom of speech is not protected in cases involving pen register use. For these reasons the *Hodge* court and all other courts dealing with the issue of pen register use have erred, at least, in failing to even consider the applicability of the freedom of speech issue. The determination that freedom of speech should place a limitation on pen register use is a separate issue. Such a determination can only be made after carefully weighing all the factors involved. At some point, however, such determination should be made.

F. Conclusion

Since 1) Title III and section 605 do not apply to the use of pen registers, 2) the fourth amendment does not apply unless governmental law enforcement is initially involved in an investigation using the pen register and 3) the first amendment limitation is not considered at all, investigations conducted by the telephone company have no limitations. Furthermore, due to the lack of control, the potential for misuse of the device in these situations is virtually unlimited.

Because the characterization of the telephone company as a private institution is debatable,[92] the lack of limits on the use of pen registers is not fully warranted. The telephone company, when investigating on its own, is consistently exempted from the limitations of the fourth amendment because it is characterized as a private agency and the fourth amendment does not limit private persons or agencies.[93] But, a comparison of the telephone company with the United States Post Office and private airline companies, organizations which have been held subject to the fourth amendment,[94] leads to the belief that an alternative characterization is possible.

92. *See* United States v. Goldstein, 532 F.2d 1305, 1311 (9th Cir. 1976) (discussing the resemblance of the telephone company to a government agency).

93. *Id. See also* note 51 *supra*, which refers to cases which hold the fourth amendment inapplicable to provate agencies and persons.

94. *See* Dyas v. Superior Court, 11 Cal. 3d 628, 522 P.2d 674, 114 Cal. Rptr. 114 (1974). In *Dyas v.* a postal employee was subject to the fourth amendment when he

In comparing the telephone company to the Post Office, it must be noted that both organizations are large monopolies which affect the United States as a whole and, both can, and have been, used effectively by law enforcement in its investigations.[95] Furthermore, both institutions operate subject to the grant of governmental authority, albeit the Post Office by federal grant and the telephone companies by various state authorizations. Any distinction based on this difference would be one without substance. The opinions holding airline companies accountable to the fourth amendment, have all looked to the express governmental grant of permission to the airlines to conduct searches to prevent hijackings.[96] No such specific grant of power has been given to the telephone company, but there may have been an inferred grant of power when the legislature omitted pen registers from Title III and section 605 restrictions.[97] The reason for their exclusion from Title III and section 605 may have been strongly related to the fact that the telephone company used the pen register in the course of its everyday business and the legislature did not want to constrain its use for that purpose.[98]

The grant of power to the airlines to search can be viewed, not only as governmental need to prevent the criminal act of hijacking, but, also as a need by the airlines to protect their business. Hence, just as the telephone company needs the pen register to detect billing fraud and to apprehend obscene telephone callers to protect its business, airlines need metal detectors to likewise protect their businesses.

The argument in court opinions pertaining to airlines also points out that the express governmental permission granted, makes government involvement inevitable and, in effect, makes airlines extensions of law enforcement, and thereby indistinguishable from it.[99] The same point can be made concerning the possible implicit authority granted to the telephone company when the legislature enacted Title III and amended section 605.

Since the telephone company uses pen registers to detect

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conducted a search of a package for criminal evidence. *See also* cases holding airlines accountable to the fourth amendment in note 55 *supra*.

95. *See Legal Constraints*, *supra* note 8, at 1029-30 (1975).

96. *See* cases cited at note 94 *supra*.

97. See the text of the legislative intent of Title III at note 79 *supra*.

98. *See Circumventing Title III*, *supra* note 16, at 752 at n.11.

99. See cases cited at note 94 *supra*.

billing fraud and in apprehending obscene telephone callers,[100] acts which both carry criminal penalties, it is acting in the capacity of governmental law enforcement. Furthermore, after making an effort to locate such criminals and compile evidence against them, it is highly unlikely that the telephone company would allow them to escape punishment. The inevitability that the information will be turned over to government agencies involved in law enforcement creates the implicit agreement between the telephone company and law enforcement leading to the inescapeable conclusion that the government is, indeed, involved in the investigation from the outset.

In considering the overall picture, legislative and judicial, a dangerous situation has developed. Congress has effectively set aside the pen register, an extremely useful information gathering device, to be used by government officials with little or no restraint. The possible strategy, deliberate or accidental, to effect such a situation is exemplified by the fact that the pen register is expressly excluded from the comprehensive wiretapping statute and the constitution is circumvented by leaving the device under the control of a so called "private" corporation.

This situation, perhaps, could have been avoided if a broader reading of the legislative history of Title III had been attempted.[101] Additionally, for future consideration, courts which have applied the fourth amendment standards to airlines,[102] appear to be moving in a direction that is more sensitive to individual rights of privacy, for they have found the requisite govern-

100. *See, Legal Constraints, supra* note 8, at 1029.

101. For a broader view see Tavernetti v. Superior Court of San Diego County, Super. Ct. No. CRN 4604 (D. CA., filed Sept. 22, 1978), which held that clause (b) of the California Invasion of Privacy Act (Cal. Pen. Code § 630-637.2 (West 1970)) permitting the telephone company to intercept telephone wires in order to do repair work without criminal penalties under clause (a), does not authorize it to act as an arm of law enforcement. In that case, evidence of a "drug deal" overheard by a telephone lineman doing repair work was suppressed as a product of an improper seizure. The court stated that the legislature had no intent to allow a violation of the right to privacy when it forbade the majority of individuals from improperly intercepting conversations but gave an exception to telephone company employees doing repair work. Any activity done outside of repair work was then subject to clause (a). This same argument could be applied to Title III. One credible assertion is that pen registers were excluded from Title III to allow the telephone company to use it in the normal course of business. The structure of the argument, following the California ruling, is that the legislative intent was not to leave one device outside the realm of statutory control while everything else was regulated. The intent was to allow the telephone company to use it for business purposes but not beyond that.

102. *See* cases cited at note 94 *supra.*

ment involvement by looking below the surface of what appeared to be a "private" enterprise seeking to protect its own industry. Extending the rationale of such decisions to the telephone company is not a difficult task. The groundwork has been laid and all that remains is the final step. To preserve the protections guaranteed by the Constitution such a step is mandated, and should be taken at the earliest possible moment.

Katherine M. Yusavage

II. PUNITIVE DAMAGES IN DEFAMATION SUITS

A. INTRODUCTION

In *Maheu v. Hughes Tool Company,* a suit for defamation was filed by a public figure, Robert Maheu, the plaintiff and former employee of Howard Hughes, against the Hughes Tool Company, presently named the Summa Corporation. The defamatory statement at issue, allegedly made by Howard Hughes, was that Maheu had stolen money from Hughes.[2] Among the damages requested by Maheu were punitive damages. The jury returned a large verdict for Maheu, but the district court granted a partial summary judgment in favor of Summa on his claim for punitive damages.[3] Maheu appealed the grant of summary judgment. The court of appeals reversed the district court, holding that punitive damages can be awarded to a public figure once the *New York Times* standard of "actual malice" has been established.[4] The court also reversed the district court as to its conclusion that California Civil Code Section 3294[5] is unconstitutional to the ex-

1. 569 F.2d 459 (9th Cir. Jan., 1977) (per Duniway, J.; the other panel members were Choy and Wallace, JJ.).

2. *Id.* at 463.

3. *Id.* at 478.

4. *Id.* at 480. The standard of "actual malice" enunciated in New York Times Company v. Sullivan, 376 U.S. 254, 279-80 (1964) is as follows:

> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

5. CAL. CIV. CODE § 3294 (West 1970) provides:

> In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

tent that it allows punitive damages in such a case. The court held that the statute is not vague or overly broad when applied in conjunction with the safeguards imposed by the *New York Times* line of cases and specifically, *Gertz v. Robert Welch, Inc.*[6]

B. The Background of Damages in Defamation Suits

The kind of damages that can be awarded in an action for defamation has undergone a substantial transformation since the common law standard was established.[7] At common law, the doctrine of general damages was applied.[8] This doctrine, in essence says, that if an act of defamation is actionable *per se*,[9] the defendant is liable for any harm caused to the reputation of the person defamed or where there is no proof of such harm, he is liable for the harm which normally results from such a defamation.[10]

The Supreme Court in *Gertz* limited the recovery of all types of damages in defamation suits involving private parties.[11] The court was concerned with the possible threat to first amendment freedoms by the uncontrolled discretion of juries in awarding damages.[12] The jury could award damages without proof of loss or even if there was no loss (e.g., when the defamation was actionable *per se*).[13] Furthermore, the court feared that the jury, through its award of damages, could punish unpopular ideas or opinions under the guise of compensating plaintiffs for injury to reputation.[14] As a result, concerning the issue of punitive damages, the court held that "the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard

6. 418 U.S. 323 (1974).

7. *See* A. Frakt, *The Evolving Law of Defamation: New York Times Co. v. Sullivan to Gertz v. Robert Welch, Inc. and Beyond*, 6 Rut.-Cam. L.J. 471, 498 (1975); Comment, *Libel and Slander—A State is Precluded from Imposing Liability Without Fault or Presumed or Punitive Damages in the Absence of New York Times Malice—Gertz v. Robert Welch, Inc.*, 6 Loy. Chi. L.J. 256, 276 (1975) [hereinafter Comment].

8. *See* Comment, *supra* note 7, at 276-77.

9. *See* Van Norman v. Peoria Journal-Star, Inc., 31 Ill. App.2d 314, 329, 175 N.E.2d 805, 811-12 (1961), "whenever the immediate tendency of the words is to impair the plaintiff's reputation," the defamation is actionable *per se*. *Id.*

10. *See* Comment, *supra* note 7, at 276 n.107.

11. 418 U.S. at 349-50.

12. *Id.* at 349. The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of first amendment freedoms. *Id. See also*, Comment, *supra* note 7, at 276-78.

13. *See* authorities cited at note 12 *supra*.

14. 418 U.S. at 350.

for the truth. . . . In short, the private defamation plaintiff who establishes liability under a less demanding standard than that stated by *New York Times* may recover only such damages as are sufficient to compensate him for actual injury."[15]

Presently, *Gertz* is the controlling view on the issue of recovery of punitive damages in cases involving defamation of private individuals.[16] Courts since *Gertz*, however, including the *Hughes* court, have extended the applicability of that holding to public individuals as well.

Although the *Gertz* holding limits recovery of punitive damages to a greater extent than they had been previous to its decision, there remains a concern that the limitation it imposes may not go far enough to protect the first amendment freedoms it seeks to protect. This concern was expressed in *Buckley v. Littell*[17] where the court reasoned that because punitive damages can still be used to selectively punish unpopular views through the unpredictable amounts that can be awarded, the Supreme Court may ultimately be led to hold that punitive damages cannot be constitutionally awarded to a public figure.[18] The *Buckley* court went on to state, however, that the Supreme Court has not yet so held, and therefore the standard established in *Gertz* must be followed.[19]

C. The District Court Ruling in Maheu

The district court which first heard the *Maheu* case[20] shared the same concerns expressed in *Buckley* and held that the state's interest in protecting an individual's reputation and privacy by deterring such statements was not a compelling justification for the limitations imposed upon the first amendment freedoms.[21] Consequently, the court held that the California statute's[22] use of

15. *Id.* at 349 and 350.

16. *See* Buckley v. Littell, 539 F.2d 882 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977). "But to date the Court . . . [has held] stating in Gertz v. Robert Welch, Inc. only that punitive damages cannot constitutionally be awarded to a plaintiff who has met a standard of proof less demanding than 'actual malice.'" *Id.* at 897. *See also* Carson v. Allied News Co., 529 F.2d 206, 214 (7th Cir. 1976); Davis v. Schuchat, 510 F.2d 731, 737 (D.C. Cir. 1975).

17. 539 F.2d 882, 897 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977).

18. *Id.*

19. *Id. See also* Carson v. Allied News Co., 529 F.2d 206 (7th Cir. 1976); Davis v. Schuchat, 510 F.2d 731 (D.C. Cir. 1975).

20. Maheu v. Hughes Tool Company, 384 F. Supp. 166, 171 (C.D. Cal. 1974).

21. *Id.*

22. *See* note 5 *supra.*

punitive damages as a means to protect against the "special dangers flowing from highly motivated, tortious conduct" was too broad (vague) in that it allowed the jury far too much discretion to determine the propriety and amount of punitive damages. As a result of its discretion, the jury could punish unpopular views through the award of such damages.[23] The court did not view the statute as being narrowly restricted enough to deter such conduct and felt that more restrictive alternatives were available to deal with the situation.[24]

D. The Ninth Circuit's Opinion

The court of appeals reversed the district court's decisions for the following reasons. First, the appeals court discussed the *Gertz* holding and read it, as other courts have read it, to imply that punitive damages may be permitted when actual malice is proven even when a public figure is involved.[25] The court concluded that, "[i]t is important to safeguard First Amendment rights; it is also important to give protection to a person who is intentionally and maliciously defamed, and to discourage that kind of defamation in the future. A balance must be struck between those two competing interests."[26]

Second, as to the charge that the California statute[27] is unconstitutional due to its vagueness, making the calculation of punitive damages uncertain and the resulting damages possibly excessive,[28] the court maintained that: 1) the statute is not vague when applied in conjunction with the safeguards imposed by the *New York Times* cases, specifically *Gertz*,[29] 2) the statute codified the California common law which "specifically defines when exemplary damages may be awarded and how the amount shall be determined,"[30] 3) uncertainty as to the preciseness of the proper damage award does not invalidate the statute,[31] and 4) because

23. 384 F. Supp. at 172.

24. *Id.* at 173.

25. 569 F.2d at 479. *See* Davis v. Schuchat, 510 F.2d at 737: "Whatever doubts may have arisen about the propriety of punitive damages . . . Gertz appears to have linked the propriety of punitive damages to the rigors of the New York Times definition of actual malice." *See also* Carson v. Allied News Co., 529 F.2d at 214; Buckley v. Littell, 539 F.2d at 897.

26. 569 F.2d at 479-80.

27. See note 5 *supra* for text of the statute.

28. Maheu v. Hughes Tool Co., 384 F. Supp. at 172-73.

29. 569 F.2d at 480. *See also* cases cited in note 16 *supra.*

30. 569 F.2d at 480. *See also* Bertero v. National General Corp., 13 Cal. 3d 43, 529 P.2d 608, 118 Cal. Rptr. 184 (1974).

31. 569 F.2d at 480.

the California courts require a reasonable connection between the punitive damages and actual damages awarded[32] and an excessive amount may be reduced by remittitur, sufficient safeguards against excessive punitive damages are provided.[33]

According to the existing authority on the issue of awarding punitive damages,[34] the Ninth Circuit appears to be resting on firmer ground in its holding than the district court whose decision it reversed. On the issue of uncertainty of the damages, however, and the possibility that such uncertain damages may be excessive, thereby infringing on first amendment freedoms, the court's analysis is less convincing.[35] The standard of measurement which the court points to as sufficient for avoiding excessive damages, is not an exact tool. It comes primarily from a compilation of the various standards used by other courts[36] in combination with the *Gertz* stipulation that the *New York Times* standard of "actual malice" be established before punitive damages are awarded.[37] In this type of situation, there is room for error, as the court seemingly admits when it stated: "If an excessive amount is awarded, the court may reduce it by remittitur."[38]

In contrast, the district court's proposals listed in footnote thirteen of the court of appeals opinion,[39] but not discussed fur-

32. *Id. See also* Brewer v. Second Baptist Church, 32 Cal. 2d 791, 802, 197 P.2d 713, 720 (1948); Toole v. Richardson-Merrell, Inc., 251 Cal. App. 2d 689, 719, 60 Cal. Rptr. 398, 419 (1967).

33. 569 F.2d at 480. *But see* Maheu, 384 F. Supp. at 172-73 which reaches the opposite result: "Although punitive damages must bear a 'reasonable relationship' to actual damages . . . there is no fixed ratio by which to determine a proper proportion between the two classes of damages." *Id.*

34. *See* authorities cited in note 7 *supra. See also* cases cited in notes 11 & 16 *supra.*

35. *See* note 33 *supra* and accompanying text (discussing *Maheu*). *See also* Buckley v. Littell, 539 F.2d at 897.

36. *See e.g.*, Rosenberg v. J.C. Penney Co., 30 Cal. App. 2d 609, 628 (libel published on sign in department store window for one day; $10,000 general damages reduced to $5,000, $15,000 exemplary damages reduced to $5,000); Collins v. Brown, 268 F. Supp. 198 (D.D.C. 1967) (defendant falsely accused plaintiff-attorney of racial prejudice and fraudulent prosecution of claim, causing several thousand dollars of actual damages to plaintiff; $30,000 punitive damages award found excessive because defamatory statement communicated to only one individual who in turn transmitted it to only one other person); Fitzgerald v. Hopkins, 70 Wash. 2d 924, 425 P.2d 920 (1967) (established sculptor defamed a beginning artist, labelling him a thief who "robs openly from a creative spirit"; $15,000 unsegregated verdict found excessive by $7,500). *Cf.* Luke v. Mercantile Accept. Corp., 111 Cal. App. 2d 431, 244 P.2d 764 (1952) (defendant converted plaintiff's car and maliciously attempted to compel plaintiff to pay off indebtedness; $580 general damages found proper, $2,500 exemplary damages held excessive).

37. *See* note 4 *supra.*

38. 569 F.2d at 480.

39. The alternatives include: 1) placing a dollar limit upon the amount of recoverable

ther, would appear to be a more realistic approach to ensuring that a definite calculation is used in all cases thereby reducing the chance that one particular viewpoint might be punished more than another. The proposals also accommodate the need to discourage future malicious defamation in that they do seek to impose an additional penalty on those who defame with malicious intent.

E. Conclusion

As the majority points out, it is important to strike a balance between the interest of first amendment rights and the need to protect persons from intentional, malicious defamation.[40] The court's proposal, however, tips the scales a little too far in favor of the deterrent interests.[41] The district court's analysis, on the other hand, appears to strike such a balance and for that reason is the better approach.

Katherine M. Yusavage

III. PUNITIVE DAMAGES IN HOUSING DISCRIMINATION SUITS

A. Introduction

In the recent case of *Fountila v. Carter*[1] the Ninth Circuit analyzed the propriety of a $5000 punitive damages award. It is the purpose of this Note to discuss the court's analysis and to suggest that the decision to remand the case was inadequately supported by the court's opinion.

B. Facts

Prospective tenants, a black family,[2] brought a housing discrimination suit against a seventy-two year old private landlord

punitive damages; 2) confining punitive damages to a particular multiple of actual damages; and 3) awarding court costs and attorney's fees. 384 F. Supp. at 173.

40. 569 F.2d at 479-80.

41. By not proposing more definite standards of computing the damages as the district court did, the appeals court has done nothing to deal with the uncertainty in the amount of damages which has disturbed the courts cited in notes 11 & 16 *supra*, in considering the same issues as those considered by the appeals court.

1. 571 F.2d 487 (9th Cir. Mar., 1978) (per Palmieri, D.J.; the other panel members were Duniway and Kennedy, JJ.).

2. The family consisted of five members, each of whom had a separate cause of action against the defendant.

under the Civil Rights Act of 1866,[3] and under Title VIII of the Civil Rights Act of 1968.[4] Defendant listed her house with a rental agency from which plaintiffs obtained her telephone number. Plaintiffs telephoned defendant in regard to renting her house. Defendant hung up on plaintiffs when she learned that they were black, allegedly stating "[O]h no, I can't rent to black people."[5] Plaintiffs arranged to have a "checker"[6] go to the defendant's house. The white checker was told that the house was still available for rent. Shortly before the checker arrived and immediately thereafter, plaintiffs themselves went to the house and were told by defendant that the house had already been rented, although she continued to show the house to whites. At trial[7] these facts were not disputed.[8] There was further evidence that the defen-

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3. 42 U.S.C. § 1982 (1974) [hereinafter referred to as The Civil Rights Act] provides: "All citizens . . . shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

The United States Supreme Court held in Jones v. Alfred H. Mayer Co., 392 U.S. 409, 413 (1968) that § 1982 bars all racial discrimination, public and private in the sale or rental of property.

4. 42 U.S.C. § 3601-3631 (1977) [hereinafter referred to as The Fair Housing Act] provides in pertinent part:

> Section 3604: Discrimination in sale or rental of housing. [I]t shall be unlawful—
>
> (a) To refuse to sell or rent after the making of a bonafide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, or national origin.
>
> . . . .
>
> (d) To represent to any person because of race, color, religion, sex, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

5. 571 F.2d at 489.

6. A "checker" is usually a nonminority person who is matched as closely as possible with complainant for age, skills and education background, and who acts as a potential tenant to determine whether racial discrimination has occurred. 571 F.2d at 489.

7. Plaintiffs brought suit in United States District Court for the Northern District of California.

8. Although these facts were not in dispute, there were contested facts. The defendant argued at trial that until plaintiffs left her house, she did not know that her real estate agent had signed a rental contract on defendant's behalf with a third party prior to plaintiffs' first contact with defendant. 571 F.2d at 489. The rental contract contained the clause, "subject to meeting the new tenant." *Id.* at 490. Defendant claimed that on the basis of this contract she could not have been guilty of racial discrimination because the house had already been rented when plaintiffs made their initial inquiry. Defendant requested a directed verdict on this issue, and subsequently a judgment notwithstanding the verdict. The Ninth Circuit affirmed the district court's denial of both motions on the ground that reasonable minds could differ as to the date on which defendant's house was actually rented in light of the qualifying clause "subject to meeting the new tenant." *Id.* at 491. The remaining issue on appeal was the propriety of awarding attorney's fees to

dant stated to the plaintiffs that she knew that she could not discriminate against them because of their race. A jury[9] found in plaintiffs' favor and awarded them one dollar actual damages and $5000 punitive damages.[10] Defendant appealed[11] to the Court of Appeals for the Ninth Circuit. The court held that the $5000 punitive damages award, although not grossly excessive, "may have been reached in an improvident manner,"[12] and was the product of misleading, prejudicial and inadequate jury instructions.[13] The court remanded the case for a new trial on the issue of the amount of punitive damages.[14]

C. PUNITIVE DAMAGES

Punitive damages[15] are monies awarded to a plaintiff to punish a defendant and to serve as a deterrent to a defendant as well as to others.[16] These damages are awarded for reasons of public policy,[17] as a reward for plaintiff's public service of bringing a

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plaintiffs and the amount of such fees. The jury awarded plaintiffs $2940 in attorney's fees. The Ninth Circuit determined that plaintiffs were entitled to attorney's fees, but remanded as to the amount. *Id.* at 495.

9. The case was tried to a jury at defendant's request in a three day trial. On appeal defendant attacked the award which was made by the jury. *Id.* at 492-93.

10. *Id.* at 488.

11. *Id.* at 491. For the basis of appeal see *supra* note 8 and accompanying text.

12. *Id.* at 492.

13. *Id.*

14. *Id.* at 495.

15. Punitive damages are also known as exemplary, vindictive, and smart money damages. *See, e.g.*, Liberty Mutual Inc. v. Stevenson, 212 Tenn. 178, 180, 368 S.W.2d 760, 761 (1963). With less frequency punitive damages have been referred to as imiginary or presumptive damages. *See, e.g.*, U.S. Fidelity and Guar. Co. v. State for Use and Benefit of Stringfellow, 254 Miss. 812, 818, 182 So. 2d 919, 922 (1966) (blood money); Oliver v. Columbia, N. & L. R. Co., 65 S.C. 1, 38, 43 S.E. 307, 320 (1902); Murphy v. Hobbs, 7 Colo, 541, 547, 5 P. 119, 122 (1884) (added damages).

16. Veeco Instruments, Inc. v. Candido, 70 Misc. 2d 333, 363, 334 N.Y.S. 2d 321, 325 (Sup. Ct. 1972). Punitive damages, unlike actual damages, are not compensatory and are not awarded as a consequence of any loss or detriment to plaintiff. *See* Jeanty v. McKey and Poague, Inc., 496 F.2d 1119, 1121 (7th Cir. 1974); Lee v. S. Home Sites Corp., 429 F.2d 290, 294 (5th Cir. 1970), *remanded and appealed on other grounds*, 444 F.2d 143 (5th Cir. 1971); Morehead v. Lewis, 432 F. Supp. 432, 438 (N.D. Ill. 1977). *See generally* C. MCCORMICK, HANDBOOK ON LAW OF DAMAGES (1935) and 25 C.J.S. Damages § 117(1) (1966). *But see* Rosado v. Santiago, 562 F.2d 114 (1st Cir. 1977), a civil rights employment case in which the court said, "We think that the district court's discretion should also be guided by considering whether actual damages would not suffice to deter a defendant's wrongdoing." *Id.* at 121.

17. "[Punitive] damages are . . . assessed for reasons of public policy and in the interest of society," Testerman v. H & R Block, Inc., 22 Md. App. 320, ____, 324 A.2d 145, 160 (1974), *rev'd*, 338 A.2d 48, 275 Md. 36 (1975) (emphasizing that malice is absolute prerequisite to punitive damages). Some courts have explicitly stated that The Civil Rights Act and The Fair Housing act were enacted in part to reflect and to implement the policy of removing the badges incident to slavery which was behind the thirteenth

defendant to account for prohibited conduct,[18] and as an incentive to bring actions where actual damages may not be sufficient incentive or compensation for the time and expense of bringing a suit. Although punitive damages are not favored in law, and are allowed only with caution and within narrow limits,[19] they are generally permitted if a defendant has acted wilfully and in gross disregard of a plaintiff's rights.[20] Ultimately, whether or not to award punitive damages is within the discretion of the trier of fact.[21] Because the amount of punitive damages is not computed by fee schedule or formula, but on the basis of several variables,[22] the amount of punitive damages awards differs from case to case.[23]

D. COURT'S ANALYSIS

The defendant argued on appeal that the evidence did not support an award of punitive damages.[24] The Ninth Circuit upheld the propriety of the punitive damages award relying on the

amendment. *See* Williams v. Matthews Co., 499 F.2d 819, 825 (8th Cir.), *cert. denied*, (two appeals), 419 U.S. 1021; 419 U.S. 1027 (1974); United States v. Hughes, 396 F. Supp. 544, 548 (W.D. Va. 1975).

18. *See* Neal v. Newburger Co., 154 Miss. 691, 700, 123 So. 861, 863 (1929).

19. Punitive damages are awarded cautiously because they are inconsistent with general tort law principles of compensation for injury, and damages under civil rights laws basically sound in tort. *See, e.g.*, Curtis v. Loether, 415 U.S. 189, 195 (1974); Knippen v. Ford Motor Co., 546 F.2d 993, 1002 (D.C. Cir. 1976); Jeanty v. McKey and Poague, Inc., 496 F.2d at 1121; Steele v. Title Realty Co., 478 F.2d 380, 384 (10th Cir. 1973); Morehead v. Lewis, 432 F. Supp. at 679.

20. Courts look at defendant's state of mind to determine whether malice was involved in the deprivation of a civil right or whether the deprivation was the result of negligence or mistake. In the latter situation, punitive damages are not awarded. *See* Gore v. Turner, 563 F.2d 159, 164 (5th Cir. 1977); Knippen v. Ford Motor Co., 546 F.2d at 1002; Marr v. Rife, 503 F.2d 735, 744 (6th Cir. 1974); Fisher v. Volz, 496 F.2d 333, 347 (3d Cir. 1974); Seaton v. Sky Realty Co., 491 F.2d 634, 638 (7th Cir. 1974); Steele v. Title Realty Co., 478 F.2d at 384; Signer v. First Nat'l Bank and Trust Co. of Covington, 455 F.2d 382, 386 (6th Cir. 1971); Lee v. S. Home Sites Corp., 429 F.2d at 294; Bishop v. Pecsok, 431 F. Supp. 34, 38 (N.D. Ohio 1976); Lamb v. Salle, 417 F. Supp. 282, 287 (E.D. Ky. 1976); Allen v. Gifford, 368 F. Supp. 317, 322 (E.D. Va. 1973); Wright v. Kaine Realty, 352 F. Supp. 222, 223 (N.D. Ill. 1972). *Cf.* Walker v. Pointer, 304 F. Supp. 56, 64 (N.D. Tex. 1969) (punitive damages were denied against a principal for the unauthorized racially discriminatory acts of his agent).

21. *See* Lee v. S. Home Sites Corp., 429 F.2d at 294; Amos v. Prom, Inc., 115 F. Supp. 127, 136 (N.D. Iowa 1953); Florida E. Coast Ry. v. McRoberts, 111 Fla. 278, 282, 149 So. 631, 632 (1933); Kirschbaum v. Lowrey, 165 Minn. 233, 236, 206 N.W. 171, 173 (1925). *See generally* C. MCCORMICK, HANDBOOK ON LAW OF DAMAGES, 296 (1935), 25 C.J.S. Damages § 117(2) (1966).

22. See notes 26-28 *infra* and accompanying text.

23. This variation leads to closer scrutiny of punitive damages awards than other types of awards which are more easily and precisely calculable, such as actual damages awards.

24. 571 F.2d at 491.

fact that the conduct of the defendant was conscious and deliberate.[25] The court then examined the amount of punitive damages awarded—$5000—to determine if it was grossly excessive.

In making that determination, the court looked at three factors: defendant's age,[26] wealth,[27] and pattern or practice of past discrimination.[28] In *Fountila,* defendant's age was seventy-two years[29] and there was no demonstrated pattern or practice of discrimination.[30] The court did not question the adequacy of the evidence on these two issues, but did imply that the evidence on the remaining issue, defendant's wealth, may have been inadequate.[31] Although the court indicated that the evidence on defendant's wealth "or lack thereof"[32] was insufficient, it did not refrain from making a determination on the issue. The court concluded on the basis of the three factors that the award could not be characterized as grossly excessive.[33] Although the court declined to so characterize the award, its analysis indicated the temper with which the court would address the other issues presented. "Although we might well have concluded, had we been

25. *Id.*

26. The court held that age is a proper factor to consider in awarding punitive damages. 571 F.2d at 492. However, the court did not examine whether age goes to both the punishment and deterrent purposes of the punitive damages award. It is arguable that a 72 year old who has fewer years left to live than a 40 year old needs much less of a financial deterrent over time. The court did not explain the relationship between age and punishment. This writer suggests that perhaps factors such as defendant's wealth and past behavior should be weighed more heavily than should age because they go to both purposes of punitive damages awards. *See* notes 27, 28 & 33 *infra.*

27. Courts have held that defendant's wealth is a proper factor to consider in the award of punitive damages. *See* Herman v. Hess Oil Virgin Islands Corp., 524 F.2d 767, 772 (3d Cir. 1975); Horn v. Guar. Chevrolet Motors, 270 Cal. App. 2d 477, 484, 75 Cal. Rptr. 871, 876 (4th dist. 1969); Hutchinson v. Lott, 110 So. 2d 442, 445 (Fla. dist. Ct. App. 1959); Bille v. Manning, 94 Cal. App. 2d 142, 145, 210 P.2d 254, 255 (1949).

28. *See* Sostre v. McGinnis, 442 F.2d 178, 205 (2d Cir. 1971), *cert. denied,* 404 U.S. 1049 (1972) and, *cert. denied sub. nom.* Ostwald v. Sostre, 405 U.S. 978 (1972); Hill v. Winkleman, 377 F. Supp. 738, 739 (S.D. Tex 1974).

29. 571 F.2d at 488.

30. *Id.* at 492.

31. "No evidence concerning Mrs. Carter's [defendant's] wealth or lack thereof—an important factor for the jury to consider in awarding damages designed to punish—was introduced, save for the fact that she owned a single piece of real property worth approximately $59,000." *Id.* at 492.

32. *Id.*

33. The seemingly inadequate evidence on defendant's wealth could have supported a remand, but the court did not discuss this. *Cf.* Marr v. Rife, 503 F.2d at 743. (remanded for an explanation of why the court awarded only one dollar in actual damages); Seaton v. Sky Realty Co., 372 F. Supp. 1322 (N.D. Ill. 1972), *aff'd,* 491 F.2d 634 (7th Cir. 1974). (court declined to assess punitive damages against a 78 year old defendant in a housing discrimination case.)

the triers of fact, that a lesser award may have been appropriate under the circumstances, we are unable to apply those extreme characterizations here."[34]

A punitive damages award may be remanded on grounds other than a finding that the award was grossly excessive.[35] The *Fountila* court discussed the following additional grounds: 1) the jury was confused or misled to the substantial prejudice of either party,[36] or 2) in some jurisdictions, the award of punitive damages was not reasonably proportionate to the actual damages award.[37] The court concluded that the punitive damages award could not be permitted to stand for both reasons[38] and thus remanded.

The jury awarded plaintiffs one dollar actual damages and $5000 punitive damages.[39] The court concluded that the award "may have been reached[40] in an improvident manner"[41] on the basis of the striking disparity[42] between these two amounts. Some courts have held that punitive damages must have a reasonably proportionate relationship to the actual damages awarded.[43] While the *Fountila* court stated that there was no required ratio between an award of actual and punitive damages, and that an award of actual damages was not a prerequisite to an award of

34. By extreme characterization the court meant "grossly excessive, monstrous, shocking to the conscience."

35. 571 F.2d at 492.

36. *Id.*

37. *Id.* at 492. *See* Dowling v. J.C. Penny Co., 300 F. Supp. 307, 311 (W.D. Pa. 1969); Wegner v. Rodeo Cowboys Ass'n, 290 F. Supp. 369, 370 (D. Colo. 1968) aff'd 417 F.2d 881 (10th Cir. 1969), *cert. denied,* 398 U.S. 903 (1970). *Contra,* Pepsi-Cola Distrib. of Charleston, Inc. v. Barker, 274 F.2d 372, 375 (4th Cir. 1960); Rogers v. Florence Printing Co., 233 S.C. 567, 574, 106 S.E.2d 258, 262 (1958).

38. Additional grounds for remand are 1) improper remarks or conduct by judge or counsel, or 2) an award which is the product of passion or prejudice. For other formulations of standards of review applied by federal courts to damages *see* LaForest v. Autoridad de Las Fuentes Fluviales de Puerto Rico, 536 F.2d 443, 447 (1st Cir. 1976); Treadway Co. v. Brunswick Corp., 364 F. Supp. 316, 322 (D.N.J. 1973) *rev'd on ther grounds,* 523 F.2d 262 (3d Cir. 1975), *cert. denied,* 429 U.S. 1090 (1977).

39. 571 F.2d at 488.

40. 571 F.2d at 492. "[M]ay have been" is very weak language to support the remand of a case. See similar weak language: "seems excessive," *id.* at 492, and "may [not must] be taken into account." *Id.* at 495.

41. 571 F.2d at 492. Improvident is defined in BLACK'S LAW DICTIONARY 891 (4th ed. 1968): "A judgment, decree, rule, injunction, etc. when given or rendered without adequate consideration by the court, or without proper information as to all circumstances affecting it, or based upon a mistaken assumption or misleading information or advice, is sometimes said to have been 'improvidently' given or issued." The court did not discuss in what way an "improvident manner" could be inferred from disparity.

42. 571 F.2d at 492.

43. See note 37 *supra.*

punitive damages,[44] it concluded that a ratio of one dollar to $5000 was so disparate that it implied that the verdict had been reached in an "improvident manner."[45] In contrast, at least one court has stated that an award of punitive damages in an amount considerably in excess of actual damages does not in itself indicate confusion on the part of jurors[46] and that the disparity between the awards standing alone may not be enough to support remand.[47]

Although the Ninth Circuit recognized the two different purposes served by awards of actual and punitive damages,[48] no rationale was offered for prohibiting the amounts of the awards from being strikingly different. In *Knight v. Auciello,*[49] a housing discrimination case, the court stated: "The violation of an impor-

44. 571 F.2d at 492. *See, e.g.,* Gill v. Manuel, 488 F.2d 799, 802 (9th Cir. 1973); Basista v. Weir, 340 F.2d 74, 88 (3d Cir. 1965); James v. Public Fin. Corp., 47 Cal. App. 3d 995, 1000 n.2, 121 Cal. Rptr. 670, 673 n.2 (1st dist. 1975). *Cf.* Childres, *Remedies,* 1965 ANN SURVEY AM. L. 289, 291 (1966) ("If punitive damages have a core function, it exists in the case in which actual damages are nominal or small.").

The *Fountila* court cited Rogers v. Loether, 467 F.2d 111, 112 n.4 (7th Cir. 1972), *aff'd sub nom,* Curtis v. Loether, 415 U.S. 189 (1974) to the effect that a finding of actual damages is not a condition to the award of punitive damages under the Fair Housing Act. However, the jury instruction which the trial court read stated, "But the jury should always bear in mind that such extraordinary damages [punitive damages] may be allowed only if the jury should first unanimously award the plaintiffs a verdict for actual or compensatory damages." *Id.* at 493. The court did not address this apparent contradiction.

The Fair Housing Act, 42 U.S.C. § 3612(c) (1977) reads in pertinent part: "The court may grant as relief . . . not more than $1,000 punitive damages."

45. 571 F.2d at 492. *See* Mitchell v. Randal, 288 Pa. 518, 520, 137 A.171, 173 (1927), (awards of $1000 actual damages and $5000 punitive damages were held too disparate and excessive); Nance v. Sheet Metal Workers Int'l Ass'n, 12 Utah 2d. 233, 235, 364 P.2d 1027, 1028 (1961) (labor union explusion case in which awards of one dollar actual and $40,000 punitive damages were held too disparate). In the following housing discrimination cases damages awards were upheld. Marr v. Rife, 503 F.2d 735 (one dollar actual and $250 punitive—remanded for reconsideration of actual damages or reason for finding); Seaton v. Sky Realty Co., 491 F.2d 634 ($500 actual and $1000 punitive as to each defendant); Stitt v. Pucinelli, No. C-77-2236 WHO (N.D. Cal. 1978) appeal docketed No. 78-2684 (9th Cir. June 5, 1978) ($2000 actual damages and $3000 punitive); Clemons v. Runck, 402 F. Supp. 863 (S.D. Ohio 1975) ($1500 actual $30,000 punitive). *See also* Wills v. Trans World Airlines, Inc., 200 F. Supp. 360, 368 (S.D. Cal. 1961) (awards of $1.54 in actual damages and $5000 in punitive damages were upheld in a suit for breach of contract and fraudulent misrepresentation); Finney v. Lockhart, 35 Cal. 2d 161, 162-64, 217 P.2d 19, 21-22 (1950) (awards of one dollar actual damages and $2000 punitive damages were upheld in an action for malicious inducement not to purchase dog food).

46. Barnett v. Love, 294 F.2d 585, 587 (4th Cir. 1961). *See generally* 22 AM. JUR. Damages § 265 (1965).

47. *Cf.* Barnett v. Love, 294 F.2d at 587 ("the disparity viewed in light of all the circumstances of the case may give rise to evidence of an award improperly reached.").

48. See notes 15, 16 *supra* and accompanying text.

49. 453 F.2d 852 (1st Cir. 1972).

tant public policy may involve little by way of actual damages, so far as a single individual is concerned, or little in comparison with the cost of vindication."[50] It is often inherent in the violation of constitutional rights that demonstrable evidence will not be available to show actual injury, which is why some courts presume injury from violation of the civil rights acts.[51]

The *Fountila* court viewed the disparity between the awards as indicative of an improvidently reached verdict, but that conclusion was unsupported and did not take into account the disparate purposes of the two awards.[52] The decision was reached without case citation or discussion of what the permissible ratio might be. The court's statement that it was using the "improvident manner" standard of review,[53] without further comment, seems inadequate to support remand.

The court next examined the damages provisions of each of the acts under which plaintiffs sued. Under The Fair Housing Act, the maximum punitive damages award is $1000,[54] whereas under The Civil Rights Act there is no mention of punitive damages or of a maximum award.[55] With few exceptions[56] however, courts have recognized that Congress intended the acts to be independent of each other[57] and have allowed recovery of greater

50. *Id.* at 853.

51. *See, e.g.*, Gore v. Turner, 563 F.2d at 164; Sexton v. Gibbs, 327 F. Supp. 134, 142 (N.D. Tex. 1970), *aff'd per curiam*, 446 F.2d 904 (5th Cir. 1971), *cert. denied*, 404 U.S. 1062 (1972). *But cf.* Tillman v. Wheaton-Haven Rec. Ass'n., 376 F. Supp. 860, 864 (D. Md. 1973) (court rejected plaintiff's argument that the court should award damages on the ground that inherent in the nature of racial discrimination is an element of "malice" or "wantonness").

52. *See* note 16 *supra.*

53. *See* note 42 *supra.*

54. 42 U.S.C. § 3612(c) provides in pertinent part: "The court may grant relief as it deems appropriate . . . [including] not more than $1000 punitive damages."

55. For the relevant portion of The Civil Rights Act *see* note 3 *supra.* The United States Supreme Court has held that punitive damages are available under The Civil Rights Act even though the Act is silent. *See* Sullivan v. Little Hunting Park, 396 U.S. 229, 239-40 (1969).

56. *See* Williams v. Matthews Co., 499 F.2d at 829; McNeil v. P-N&S. Inc., 372 F. Supp. 658, 659 (N.D. Geo. 1973). *Cf.* Smith v. Adler Realty Co., 436 F.2d 344, 346 (7th Cir. 1970) (plaintiff sought only $1000); Lamb v. Sallee, 417 F. Supp. at 286 (plaintiff sought only $1000); Hughes v. Dyer, 378 F. Supp. 1305, 1311 (W.D. Mo. 1974) (court said it would give appropriate consideration to the $1000 limit under The Fair Housing Act and awarded $1000 punitive damages).

57. *See* Sullivan v. Little Hunting Park, 396 U.S. at 237; Jones v. Alfred H. Mayer Co., 392 U.S. at 416-17 n.20; Warren v. Norman Realty Co., 513 F.2d 730, 733 (8th Cir. 1975), *cert. denied*, 423 U.S. 855 (1975); Lee v. S. Home Sites, 429 F.2d at 295; Johnson v. Zaremba, 381 F. Supp. 165, 166-68 (N.D. Ill. 1973).

than $1000 when a plaintiff sued under both acts[58] or under The Civil Rights Act alone.[59] The Ninth Circuit, with obvious reservation, has accepted the independence of the acts.[60]

The jury instruction on punitive damages contained the following statement: "However, you must keep in mind that the Federal law imposes no maximum limit on the amount that may be awarded [in punitive damages] while the State imposes a limit of $250."[61] The Ninth Circuit analyzed this instruction and concluded that it misled the jury as to the federal maximum because there is a $1000 maximum under The Fair Housing Act.[62] Although the court concluded that it was literally true that there was no federal maximum in that the jury could award more than $1000,[63] it concluded that the maximum under The Fair Housing Act should have been included in the instruction as a guideline for the jury, and that omission of that guideline misled the jury by not indicating "what might constitute a reasonable and appropriate award."[64]

Although there is support for the court's position that giving The Fair Housing Act maximum as a guideline is "appropriate,"[65]

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58. *See, e.g.*, Bishop v. Pecsok, 431 F. Supp. 34 (N.D. Ohio 1976) ($5000 punitive damages); Parker v. Shonfeld, 409 F. Supp. 876 (N.D. Cal. 1976) ($10,000 punitive damages); Clemons v. Runck, 402 F. Supp. 863 (S.D. Ohio 1975) ($3000 punitive damages).

59. Allen v. Gifford, 368 F. Supp. 317 (E.D. Vir. 1973) ($5000 punitive damages).

60. 571 F.2d at 494. "[W]e would be more inclined to give great weight to the more recent and specific expression of Congressional intent, as set forth in the 1968 Act, that punitive damages awards not to exceed $1000 are sufficient for the vindication of the federal policy against discrimination in housing." *Accord*, Parker v. Shonfeld, 409 F. Supp. at 880; Wright v. Kaine Realty, 352 F. Supp. at 223.

61. 571 F.2d at 493. For the relevant portions of the Acts *see* notes 3, 4, & 44 *supra*. CAL. CIV. CODE § 52 (West 1970) reads in pertinent part:

> (a) Whoever denies . . . on account of . . . race . . . contrary to the provisions of [the Unruh Civil Rights Act] . . . is liable for each and every such offense for the actual damages, and two hundred and fifty dollars ($250) in addition thereto, suffered by any person denied the rights provided in Section 51 of this code.

Subdivision (a) of this section was changed by a 1976 amendment to read in pertinent part: "[A]ctual damages and . . . up to a maximum of three times the amount of actual damages but in no case less than two hundred and fifty dollars ($250) . . . ." In Sullivan v. Little Hunting Park the court stated, "[B]oth federal and state rules on damages may be utilized, whichever better serves the policies expressed in the federal statutes." 396 U.S. at 240. *See* Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 457 (1957) where state law was applied. *See also* Niles, *Civil Actions for Damages Under the Federal Civil Rights Statutes*, 45 TEX. L. REV. 1015, 1023 (1967).

62. 571 F.2d at 494.

63. *Id.*

64. *Id.* at 495.

65. Guideline instruction approved but not given. Parker v. Shonfeld, 409 F. Supp.

there is also support to the effect that nonuse of the guideline is an inadequate basis for remand if the issue is not properly raised. In *Parker v. Shonfeld,*[66] suit was brought under both Acts, and The Fair Housing Act guideline was not given in the jury instruction. Defendant similarly argued on appeal that the guideline should have been included in jury instructions. Although that court was sympathetic to defendant's contention,[67] it declined to address the issue because defendant's objection to the omission was untimely and improperly directed to the court.

In the instant case, a similar analysis would have been appropriate. There is no evidence in the opinion that defendant objected to the absence of the guideline or to the "no Federal maximum" language at trial. Under Federal Rules of Civil Procedure, rule 51, if a party has not objected to the matter in the lower court, the issue may not be raised for the first time on appeal.[68] On the basis of rule 51, it appears that defendant should not have been allowed to raise this issue on appeal and that the court should not have remanded using that omission for support.[69] Assuming that the guideline issue was properly before the court,[70] it must then be determined whether that omission misled the jury to the prejudice of the parties. The court of appeals concluded that: "We are concerned that this language [no maximum

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at 880-81; Hughes v. Dyer, 378 F. Supp. at 1311; Wright v. Kaine Realty Co., 352 F. Supp. at 223.

66. 409 F. Supp. 876 (N.D. Cal. 1976).

67. *Id.* at 880.

68. FED. R. CIV. P. 51 [hereinafter referred to as rule 51] states:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

69. The court discussed rule 51 in relation to defendant's claim that the court did not instruct the jury on the law of agency. 571 F.2d at 491. *See also* note 8 *supra*. This is the only time the court mentioned rule 51 in its opinion. It is unclear whether this court would have found the instructions misleading if the judge had omitted the guideline and had not said that there was no federal maximum.

70. The court of appeals has the power to notice plain error not assigned. FED. R. EVID. 103. *See, e.g.*, Frederic P. Weidersum Assoc, v. Nat'l Homes Const., 540 F.2d 62, 66 (2d Cir. 1976). *Contra*, Hargrave v. Wellman, 276 F.2d 948, 950 (9th Cir. 1960).

limit], while perhaps literally true, may have been misleading and productive of an excessive verdict."[71] The court did not state why the "no federal maximum" language meant that the award was excessive rather than inadequate.[72] It could equally have been maintained that since the lower court instructed the jury as to the state $250 maximum and the jury awarded $5000, that if the $1000 maximum had been read, the jury might have returned a verdict exceeding $5000.[73] The court did not state its rationale for concluding that the omission was prejudicial and required remand. Not every error requires remand[74] and the court did not demonstrate that this error, assuming it was an error, required remand.

The third factor which the court analyzed was the trial judge's inadvertent omission of a sentence of the jury instruction stating the purpose of a punitive damages award. Defendant objected to this omission after having had his objection to its inclusion overruled at trial.[75] The court of appeals sustained defendant's objection on appeal, and held, "This omission [of purpose] was prejudicial to appellant [defendant] in that it had the effect of removing from the jury's consideration the only instruction setting forth the purpose of an award of punitive damages."[76] The court's analysis on this issue is somewhat tenuous. Under rule 51, "[n]o party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires."[77] Defendant objected to the inclusion of the instruction before the jury retired, but the objection that the instruction not

71. 571 F.2d at 494.

72. *Id.* at 493. The conclusion of assuming excessiveness over inadequacy is another index of the court's predisposition towards remand.

73. *See* International Paper Co. v. Busby, 182 F.2d 790, 792 (5th Cir. 1950), wherein the court stated that where the charge, considered as a whole, operated to greatly reduce plaintiff's claim for damages, defendant was not prejudiced and could not complain.

74. FED. R. CIV. P. 61 reads in pertinent part: "Harmless error: The court at every stage of the proceeding must disregard any error or defect . . . which does not affect the substantial rights of the parties." *See, e.g.*, Ball v. E.I. DuPont De Nemours Co., 519 F.2d 715, 717 (6th Cir. 1975). 28 U.S.C. § 2111 (1959) provides "Harmless error: On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

75. 571 F.2d at 494 n.3.

76. 571 F.2d at 494. This sentence says, in effect that the omission of purpose was prejudicial because the jury was not told the purpose. This appears to be circular logic and not an adequately justified basis on which to remand. The court never explained why the omission of purpose was prejudicial under the circumstances.

77. *See* note 68 *supra* for text of rule 51.

be used was overruled.[78] In contrast to defendant's trial position, on appeal defendant's counsel cited as error the omission of the very same instruction which he had tried to exclude in the lower court. This shift in theory on appeal has not been sanctioned by courts in cases which arise under rule 51.[79] "A defendant is not entitled to complain about an instruction . . . which he expressly objected to or refused."[80] The court's only reference to defendant's change in theory was in a footnote[81] which did not address rule 51 prohibitions.[82]

The court stated that the omission of purpose prejudiced the defendant because her counsel did not address the matter of purpose in his closing statement, relying on the fact that the disputed sentence would be read.[83] At trial, defendant objected that the statement of purpose was too vague.[84] However in defendant's counsel's closing statement, there was no attempt to clarify or supplement the instructions which he expected the judge to read. Defendant's motives in protesting the inclusion of the sentence were inconsistent if not tenuous because: 1) there was no evidence that defendant's counsel made an attempt to cure the alleged vagueness in his closing statement, and 2) on appeal he argued against his own trial position. The court did not address the permissibility of defendant's change in position under rule 51. The absence of a justification for both allowing defendant to assign this as error and the failure to object to it as plain error does not add to the persuasiveness of the court's reasoning or its decision to remand.

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78. Defendant objected on the ground that the instruction was too vague. 571 F.2d at 484 n.3.

79. *See, e.g.*, Arley v. United Pac. Co., 379 F.2d 183, 188 (9th Cir. 1967), *cert. denied*, 390 U.S. 950 (1968); Ellisworth Freight Lines, Inc. v. Coney, 376 F.2d 475, 478 (7th Cir. 1967); Hargrave v. Wellman, 276 F.2d at 950-51.

80. 1 DEVITT & BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS, § 7.03 (3d ed. 1977).

81. 571 F.2d at 494 n.3.

82. *See* notes 68, 69 *supra*.

83. 571 F.2d at 494.

84. It is unclear from the court's opinion whether or not defendant objected that the instructions were too vague without submitting instructions of her own. However Appellee's brief at 10 stated, "At no time did defendant offer any instructions to the court on the issue of damages." Brief for Appellee, Fountila v. Carter, 571 F.2d 487 (9th Cir. 1978). If defendant did offer instructions on purpose, then the argument that defendant was prejudiced is much stronger because she would not have been arguing merely for exclusion at trial, but for inclusion of some statement of purpose. This would have lent credibility to her objection on appeal and would affect the rule 51 analysis concerning change in theory. It should be noted, however, that the instructions which the trial judge planned to give were taken from 3 DEVITT & BLACKMAR. FEDERAL JURY PRACTICE AND INSTRUCTIONS § 85.11 (3d ed. 1977). *Id.* at 493.

However, proceeding on the assumption that defendant could properly raise this issue on appeal,[85] the court discussed briefly the potentially curative effect of plaintiffs' counsel's closing statement on the purpose of punitive damages.[86] In her summation, plaintiffs' counsel commented on the exemplary purpose of punitive damages, but did not use the word "deterrent" or comment explicitly on their punitive aspect.[87] The court acknowledged the content of counsel's statement and implied that her comments were inadequate, but did not say so explicitly or comment at all on their effect. The court did not indicate whether or not a more complete statement of purpose would have been sufficient to cure the inadvertant omission.

In *Delancey v. Motichek Towing Service, Inc.*,[88] the court noted that the function of the reviewing court with respect to instructions is to satisfy itself that the instructions show no tendency to confuse or mislead the jury with respect to the applicable principle of law.[89] In view of the entire jury instruction, the stress on defendant's state of mind in the instruction, the plain and ordinary meaning of the words "exemplary" and "punitive" as understood by the layperson, and plaintiffs' counsel's explanation of the exemplary purpose of punitive damages, the court may have "satisfied *itself*" that the jury was confused or misled by the omission of purpose, but the court did not demonstrate that fact in the opinion.

E. Conclusion

The Ninth Circuit indicated in the beginning of its analysis that it regarded the $5000 punitive damages award as excessive.[90] The court supported its decision to remand with language such

85. *See* note 70 *supra* on plain error.

86. A recital of purpose by counsel may not carry the same weight as a jury instruction given by the judge. This is reflected in rule 51 set out in note 68 *supra*.

87. The court did not explain in what way exemplary purpose differs from the punitive and deterrent purposes of punitive damages awards, *see* note 15 *supra*, and particularly why plaintiffs' counsel's statement on exemplary damages did not convey the essence of deterrence. "So we are asking you to also award exemplary damages in the amount that you see fit, so that other people will know and understnd that this is against the law and the law must be applied equally to all people. And that it is against the law to discriminate on the basis of race." 571 F.2d at 494 n.4. If the jury knew of just the exemplary purpose of punitive damages, and not of the punishment and deterrent purposes as the court suggests, it is arguable that the jury would have awarded more than $5000 rather than less. *See* note 72 *supra*.

88. 427 F.2d 897, 901 (5th Cir. 1970).

89. This is one of several formulations of the standard of review. *See* note 94 *infra*.

90. *See* note 33 *supra* and accompanying text.

as *"may have been* reached in an improvident manner"[91] after acknowledging that the award "seems excessive,"[92] and after making it clear that if this had been a case of first impression, the court would have imposed The Fair Housing Act maximum of $1000.[93] From this biased position, the route the court took to justify remand was not persuasive.

It has been suggested that reviewing courts should not interfere except in extreme cases when injustice has been done.[94] The Ninth Circuit demonstrated neither that this was an extreme case nor that injustice had been done. Therefore, the jury award should have been upheld. Moreover, *Fountila v. Carter* does not bring clarity to the question of what is a proper award of punitive damages in housing discrimination suits, but it is not alone in the quagmire. There are several reasons and a multitude of cases which explain why there is so little predictability and calculability in such awards.

First, in making the award, courts acknowledge that there are generally three variables which are evaluted: age, wealth, and pattern and practice of past discrimination.[95] It is difficult to place a value on these factors either individually or collectively. Furthermore, there is no schedule for computing in dollars how much a wealthy, actively racist eighty year old should pay in punitive damages as opposed to a middle income, middle aged couple who have discriminated infrequently. Because of the leeway left to the trier of fact in assessing the amount, awards vary on similar facts.

Second, if two plaintiffs are victims of the same civil rights violation, they may receive disparate awards depending on the act(s) under which they sue. The Fair Housing Act has a $1000 limit while The Civil Rights Act has no limit. If the plaintiff sues under both acts he or she *may* be subject to having The Fair Housing Act maximum used as a guideline.

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91. *See* notes 41, 42 *supra* and accompanying text.

92. *See* note 33 *supra.*

93. 571 F.2d at 494.

94. *See generally* 22 AM. JUR. Damages § 266 (1965). *Accord,* Harkins v. Ford Motor Co., 437 F.2d 276, 278 (3d Cir. 1970) in which the court stated, "[t]his is not a situation where there was 'fundamental' error in a charge which was 'highly prejudicial' and failure to rectify the error 'would result in a gross miscarriage of justice.'" *See also* Troupe v. Chicago, D. & G. Bay Transit Co., 234 F.2d 253, 259-60 (2d Cir. 1956).

95. *See* notes 26-28 *supra.*

Third, potential uniformity is further frustrated because some courts require that the award of punitive damages be reasonably proportionate to the award of actual damages while others do not.

Fourth, and most significantly, courts have not implemented, evaluated or explained to any useful degree, the standards to be used in making or reviewing punitive damages awards. In *Parker v. Shonfeld,*[96] plaintiffs were awarded $10,000 punitive damages. The controlling factor, the court stated, was that defendants were worth $500,000. However, the court did not state defendants' ages or past discrimination practices. In *Seaton v. Sky Realty Inc.,*[97] one of the defendants escaped punitive damages completely, not because she was any less culpable than her co-defendants, but apparently solely because she was seventy-eight years old.[98] The court did not comment on her financial status or on her past pattern of discrimination. Although *Fountila* discussed all three factors and concluded that evidence on defendant's wealth may have been insufficient, it evaluated the award and concluded that the $5000 punitive damages assessed against the seventy-two year old was not grossly excessive.

Fountila in no way interferes with the roulette wheel scheme of making and reviewing punitive damages awards in housing discrimination cases. This is especially true because the court's opinion is fraught with ambiguities and tenuous conclusions, which enable it to be narrowed to its facts. The lack of uniformity among punitive damages awards in general and the precarious analysis by the *Fountila* court increase the likelihood that *Fountila v. Carter* will be of negligible precedential value on the issue of punitive damages in the Ninth Circuit and elsewhere.

Wendy Maurice

IV. ATTORNEY'S FEES IN HOUSING DISCRIMINATION SUITS

A. INTRODUCTION

There are two basic federal statutes under which one can sue in a suit for housing discrimination based on race. They are The

96. 409 F. Supp. 876.
97. 491 F.2d at 634.
98. *See* Seaton v. Sky Realty Co., 372 F. Supp. 1322, 1325 (N.D. Ill. 1972).

Civil Rights Act of 1866[1] (section 1982) and The Civil Rights Act of 1968.[2] Although most courts have held that attorneys' fees[3] are available when a plaintiff brings suit under either or both of these acts, the requirements for an award of attorneys' fees are different under each act. This Note will discuss some of the factors which courts examine in making awards of attorneys' fees in housing discrimination cases under these acts, and the effect which the Civil Rights Attorneys' Fees Awards Act of 1976[4] has had in this area.

The traditional American rule disfavors the allowance of attorneys' fees.[5] However, there are several recognized exceptions[6] to this common law rule disfavoring fee shifting.[7] Attorneys' fees may be recovered from the opposing party where provided by

1. 42 U.S.C. § 1982 (1977) [hereinafter § 1982]: All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

2. 42 U.S.C. §§ 3601-3631 (1976) [hereinafter referred to as The Fair Housing Act]. Section 3604 provides in pertinent part:

> it shall be unlawful—
>
> (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, or national origin.
>
> . . . .
>
> (d) To represent to any person because of race, color, religion, sex, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

3. Attorney's fees are not costs absent statutory provision giving them that character. *See generally* 4A WORDS AND PHRASES, Attorneys' Fees, 535 (1969).

4. 42 U.S.C. § 1988 (1978) [hereinafter referred to as § 1988] reads in pertinent part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceedings by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

5. *See, e.g.*, Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975); Hall v. Cole, 412 U.S. 1, 4 (1973); Mills v. Elec. Auto Lite Co., 396 U.S. 375, 391-92 (1970).

6. One exception which will not be mentioned again in this Note is for willful disobedience of a court order, *see* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. at 258 *citing* Toledo Scale Co. v. Compiling Scale Co., 261 U.S. 399, 426-28 (1923); Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967); Church of God of La., Inc. v. Monroe Ouachita R.P.C., 404 F. Supp. 175, 182 (W.D. La. 1975).

7. Some courts have explicitly held that fee shifting is punitive. *See, e.g.*, Hall v. Cole, 412 U.S. at 5; Carter v. Noble, 526 F.2d 677, 678 (5th Cir. 1976).

statute[8] or enforceable contract,[9] where a party has proceeded in bad faith,[10] or under the common fund-substantial benefit theory.[11] Until the United States Supreme Court's 1976 decision in *Alyeska Pipeline Service Co. v. Wilderness Society*,[12] courts had also awarded attorneys' fees under the private attorney general exception sanctioned by *Newman v. Piggie Park Enterprises, Inc.*[13] This exception was predicated on the notion that the prevailing party was vindicating an important public policy.[14] The Court's decision in *Alyeska Pipeline,* eliminating the private attorney general exception, evidenced a decision to adhere to the American rule and its traditional exceptions, leaving it to the legislature to establish statutory exceptions.[15]

B. Background of the Acts

Section 1982 and The Fair Housing Act in part were passed to reflect and to implement the policy behind the thirteenth

8. *See, e.g.*, 42 U.S.C. § 3612(c) (1977); 42 U.S.C. § 2000a-3(b) (1976).

9. A court may, in its discretion, disregard fee arrangements between client and attorney. *See* Clark v. Am. Marine Corp., 320 F. Supp. 709, 711 (E.D. La. 1970), *aff'd* 437 F.2d 959 (3d Cir. 1971).

10. *See, e.g.*, Christiansburg Garment Co. v. EEOC, ___ U.S. ___, 98 S. Ct. 694, 699 (1978); Hall v. Cole, 412 U.S. at 5; Carter v. Noble, 526 F.2d at 678-79.

11. *See, e.g.*, Mills v. Elec. Auto Lite Co., 396 U.S. at 392-97; Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 167 (1939); Clemons v. Runck, 402 F. Supp. 863, 870 (S.D. Ohio 1975). The common fund exception applies when a party, at his or her own expense, brings suit and creates or preserves a fund in which others share. If no fund has been created or preserved, the exception applies if plaintiff's litigation has conferred a substantial benefit on an identifiable class. *See* Lindy Bros. Bldrs., Inc. of Philadephia v. Am. R. & S. Sanitary Corp., 487 F.2d 161 (3d Cir. 1973). *See* note 44 *infra*.

12. 421 U.S. 240 (1975).

13. 390 U.S. 400, 402 (1968). *See, e.g.*, Southeast Legal Defense Group v. Adams, 436 F. Supp. 891, 893 (D. Ore. 1977).

14. *See, e.g.*, Doe v. Poelker, 515 F.2d 541, 546 (8th Cir. 1975), *rev'd on other grounds*, 432 U.S. 519 (1977) (plaintiff challenged the constitutionality of abortion practices and procedures); Fowler v. Schwarzwalder, 498 F.2d 143, 146 (8th Cir. 1974) (class action civil rights suit to enjoin employment of city firemen on the basis of racially discriminatory examining and hiring practices). This exception was also applied in the following housing discrimination cases brought under § 1982, Knight v. Auciello, 453 F.2d 852 (1st Cir. 1972); Lee v. S. Home Sites Corp., 444 F.2d 143 (5th Cir. 1971). The latter two cases were criticized in Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. at 270 n.46 for erroneously employing the private attorney general approach.

15. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975). "[I]t would be inappropriate for the Judiciary, without legislative guidance, to reallocate the burdens of litigation in the manner and to the extent argued by respondents and approved by the Court of Appeals." *Id.* at 247. *See also* Marshall's dissent. "[T]he Court today takes an extremely narrow view of the independent power of the courts in this area." *Id.* at 272. At least one writer has suggested that § 1988 is of greater value to the enforcement of civil rights than would have been a favorable decision in Alyeska Pipeline. *See* Derfner, *One Giant Step: The Civil Rights Attorney's Fees Awards Act of 1976,* 21 St. Louis U.L.J. 441, 451 (1977).

amendment.[16] Section 1988, which covers section 1982 but not The Fair Housing Act which has an attorneys' fees provision, was passed in order to "remedy anomalous gaps in our civil rights laws created by *Alyeska,*"[17] to encourage compliance with civil rights statutes and Constitutional mandates,[18] and to encourage individuals injured by racial discrimination to seek judicial relief.[19] Unlike section 1982 or The Fair Housing Act, section 1988 is procedural and cannot itself be the basis of a cause of action.[20]

There are facial differences among the three statutes;[21] most notable is that section 1982 is silent on the issue of attorneys' fees. The following is a discussion of some of the issues most commonly raised in housing discrimination suits under these acts, the interpretation of section 1982 before and since section 1988, and the relationship between section 3612(c) of The Fair Housing Act[22] and section 1982.

C. Financial Ability to Assume Attorneys' Fees

Prior to the enactment of section 1988, when plaintiff sued under section 1982 and The Fair Housing Act, often only section 3612(c) of The Fair Housing Act was applied in awarding attorneys' fees, with little or no discussion of section 1982. Section 3612(c) allows an award of attorneys' fees at the court's discretion when 1)the plaintiff prevails[23] and 2)the plaintiff is financially unable to assume them.[24] Although section 1982 is silent on the

16. Williams v. Matthews Co., 499 F.2d 819, 825 (8th Cir. 1974), *cert. denied,* 419 U.S. 1027 (1974); United States v. Hughes Memorial Home, 396 F. Supp. 544, 548 (W.D. Va. 1975).

17. S. Rep. No. 94-1011, 94th Cong., 2d Sess. 1 (1976) *reprinted* in [1976] U.S. Code Cong. & Ad. News 5908, 5909.

18. Newman v. Piggie Park Enterprises Inc., 390 U.S. at 402; Lund v. Affleck, 442 F. Supp. 1109, 1111 (D.R.I. 1977); Pennsylvania v. O'Neill, 431 F. Supp. 700, 708 (E.D. Pa. 1977), *aff'd. mem.*, 573 F.2d 1301 (3d Cir. 1978).

19. Newman v. Piggie Park Enterprises, Inc., 390 U.S. at 402; Steele v. Title Realty Co., 478 F.2d 380, 385 (10th Cir. 1973) *citing Newman.*

20. Nor was it designed to create a remedy for violation of federal civil rights not already authorized under statutes covered by § 1988. *See* note 4 *supra* for the text of § 1988. *See* Cannon v. Univ. of Chicago, 559 F.2d 1063, 1078 (7th Cir. 1976), *cert. granted,* 98 S. Ct. 3142 (1978); Reeves v. Am. Optical Co., 408 F. Supp. 297, 302 (W.D.N.Y. 1976).

21. See notes 1, 2 & 4 *supra.*

22. Section 3612(c) reads in pertinent part: "The court may grant as relief, as it deems appropriate, . . . reasonable attorney fees in the case of a prevailing plaintiff: *Provided,* that the said plaintiff in the opinion of the court is not financially able to assume said attorney's fees."

23. This is distinguishable from § 1988 which provides recovery for the prevailing party in some circumstances. *See* note 60 *infra* and accompanying text.

24. *Compare* Smith v. Anchor Bldg. Corp., 536 F.2d 231, 236 n.9 (8th Cir. 1976) ("Plaintiff is unable to assume such fees considering her current assets and immediate

issue of attorneys' fees, prior to the enactment of section 1988 courts did allow attorney's fees, when suit was brought under section 1982 alone.[25] The different provisions of section 3612(c) and section 1982 resulted in some inconsistent if not ingenious resolutions to the relationship between these two sections by the courts.

In *Clemons v. Runck*,[26] plaintiff sued under both section 1982 and The Fair Housing Act, and prevailed. In resolving the issue of how to handle the explicit provisions of section 3612(c) and the lack thereof in section 1982, the court stated that if it could apply one of the exceptions to the American rule, it would make the award of attorneys' fees under section 1982 without limiting the award by the financial ability of plaintiff as is required by section 3612(c).[27] In contrast, in *Crumble v. Blumthal*,[28] the court acknowledged the availability of attorneys' fees under both acts,[29] but declined to make an award under section 1982 any more liberal than under section 3612(c).[30] That court disallowed an award of attorneys' fees by finding that plaintiffs had not demon-

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economic prospects realistically viewed. Speculative consideration of future earnings, anticipated profits and the like are to be avoided."), *with* Steele v. Title Realty Co., 478 F.2d at 385, ("The test is not limited to present ability of the plaintiff to pay but whether he is financially able to assume them.") *Smith* states that its formulation does not conflict with *Steele*, 536 F.2d at 236 n.9. *See, e.g.*, Hairston v. R & R Apts., 510 F.2d 1090, 1091 (7th Cir. 1975) (plaintiff, who sued under § 1982 and The Fair Housing Act, was a Marine Corps recruiting officer earning $436 per month, and was held unable to bear costs of litigation, including attorneys' fees); Marr v. Rife, 503 F.2d 735, 743 (6th Cir. 1974) (plaintiff who sued under § 1982 and The Fair Housing Act, had income in the year in which the violation occurred and the preceeding year of $12,847 and $9,739 respectively. The circuit court asked on remand for an explanation of why attorney's fees were denied); Clemons v. Runck, 402 F. Supp. at 870 (plaintiffs who had a combined income of over $30,000 per year were held financially able to assume fees); Stevens v. Dobs, Inc., 373 F. Supp. 618, 621-22 (E.D.N.C. 1974) (plaintiff who sued under § 1182 and The Fair Housing Act was held financially able to assume 50% of his attorneys' fees when he was employed at the time of the action at $9,000 to $10,000 per year, but had to quit his job to return to school at the time fees were awarded); Sanborn v. Wagner, 354 F. Supp. 291, 297 (D. Md. 1973) (plaintiff sued under § 1982 and The Fair Housing Act and the court held that indigency is not the test applied to "financially able" because that would preclude recovery of any fees by persons with the financial ability to own any kind of home or to seriously seek home ownership).

25. Knight v. Auciello, 453 F.2d at 853; Morales v. Haines, 486 F.2d 880, 882 (7th Cir. 1973); Lee v. S. Home Sites, 444 F.2d at 144. *Contra*, Hodge v. Seiler, 558 F.2d 284, 286 (5th Cir. 1977) (the district court did not allow attorneys' fees because there was no explicit authorization for them. However, on appeal, § 1988 applied).

26. 402 F. Supp. 863 (S.D. Ohio 1975).

27. *Id.* at 871. The court found that the defendants were acting in bad faith. *Accord*, Lamb v. Sallee, 417 F. Supp. 282, 288 (E.D. Ky. 1976).

28. 549 F.2d 462 (7th Cir. 1977).

29. *Id.* at 467.

30. *Id.* at 468.

strated inability to assume the expense.[31] A different approach was taken by the court in *Parker v. Shonfeld*[32] in which the issue was avoided entirely by applying the bad faith exception to the American rule in awarding attorneys' fees without discussing either section 1982 or section 3612(c).

Despite the fact that courts are no longer faced with the silence of section 1982, section 1988 has not eliminated confusion as to which standards should be applied when plaintiff sues under section 1982 and The Fair Housing Act, in that section 1988, unlike section 3612(c) has no financial qualification.[33] In *Hughes v. Repko*[34] plaintiffs sued under section 1982 only. The trial court awarded attorneys' fees under section 1988, but applied the section 3612(c) criterion of financial inability rather than relying on the theory that if Congress had intended section 3612(c) to be applied to section 1988, it would have so stated. The Third Circuit reversed, reasoning that there was no apparent congressional intent to limit awards under section 1982. However, the appellate court declined to express an opinion on whether a court, in its discretion, could consider financial ability in awarding attorney's fees.[35]

In *Fountila v. Carter,*[36] a recent Ninth Circuit case, plaintiffs sued under both acts and the award of attorneys' fees was made under section 1988 without application of the section 3612(c) limitation. The court did not explain its reason for disregarding section 3612(c), however the rationale may have been twofold. First, the court, in spite of its inclination to do otherwise,[37] acknowledged that the United States Supreme Court has held that section 1982 stands independently of section 3612(c) and that section 3612(c) in no way affects section 1982.[38] Therefore application of section 3612(c) criteria to section 1982 would contravene congres-

31. *Id. Cf.* Hairston v. R & R Apts., 510 F.2d at 1092 n.1 (court held that because plaintiff was unable to finance an attorney while earning $436 per month, that it was unnecessary to consider what effect the financial status restriction of § 3612(c) had on an award under § 1982).

32. 409 F. Supp. 876, 882-83 (N.D. Cal. 1976).

33. *See* note 4 *supra* for pertinent text.

34. 578 F.2d 483 (3d Cir. 1978) *vacating in part and remanding*, 429 F. Supp. 928 (W.D. Pa. 1977).

35. 578 F.2d at 488. *But see* Walker v. Fox, 395 F. Supp. 1303, 1307 (S.D. Ohio 1975).

36. 571 F.2d 487 (9th Cir. Mar., 1978) (per Palmieri, D.J.; the other panel members were Duniway and Kennedy, JJ.).

37. *Id.* at 494.

38. Sullivan v. Little Hunting Park, 396 U.S. 229, 237-38 (1969); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 416-17 (1968).

sional intent and United States Supreme Court interpretation.[39] Second, the court may have reasoned, as was done in *Clemons v. Runck*,[40] that the award of punitive damages was made under section 1982 because that award exceeded the $1000 maximum on punitive damages under section 3612(c), and that therefore the award of attorneys' fees should be made under section 1982 also. Whatever the court's reason, it appears that the Ninth Circuit will not apply section 3612(c) financial status requirement to section 1988 when plaintiff sues under both acts or under section 1982 alone.

The Ninth Circuit has also recently addressed the issue of recovery of attorneys' fees when plaintiff has entered into a contingent fee contract. Under such an agreement between client and attorney, the attorney collects the fee from the recovery if the client prevails, but receives no fee if the client loses. In *Samuel v. Benedict*[41] plaintiff sued under section 1982 and The Fair Housing Act, but was precluded from raising the issue of recovery of attorneys' fees under section 1982 because such an argument was not raised in the lower court.[42] On the basis of section 3612(c)'s financial inability clause, plaintiff was refused attorneys' fees because the court held that the contingent fee agreement made plaintiff financially able to assume such fees.[43] The court concluded that its disallowance of attorneys' fees did "not penalize those who used a contingent fee to finance their litigation any more than a denial of double recovery penalized those whose insurance policies guard against injury."[44] It is unclear whether

39. The *Fountila* court instructed on remand that the $1000 maximum limit on punitive damages under § 3612(c) be used as a guideline in making the punitive damages award, but it did not order that the $1000 maximum not be exceeded.

40. 402 F. Supp. at 871.

41. 573 F.2d 580 (9th Cir. Feb., 1978) (per Choy, J.; the other panel members were Wright and Tang, JJ.).

42. *Id.* at 583.

43. *Id.* at 581.

44. *Id.* at 583. In Hughes v. Repko, 429 F. Supp. 928 (W.D. Pa. 1977), plaintiff sued under § 1982 only. His attorney agreed not to charge any fee, erroneously believing that he would be awarded his fee by the jury. The court awarded him attorney's fees, but reduced the amount originally computed because of plaintiff's financial condition and the "quality of the legal work and the contingency of success." *Id.* at 931. The Third Circuit vacated and remanded stating that contingency may not be used to reduce the award. 578 F.2d at 487-88. In Pennsylvania v. O'Neill, 431 F. Supp. at 712, plaintiffs challenged the hiring and promotional practices of the Philadelphia Police Department on racial grounds under 42 U.S.C. § 1981 which is covered by § 1988. Plaintiffs sought injunctive relief rather than damages. The court awarded attorneys' fees in excess of the amount originally computed on the basis of the "contingent nature of success" and that "the attorneys assumed the risk of investing a tremendous amount of hours, overhead and

or not the court would have allowed "double recovery" under section 1982 under which financial ability is not a consideration.

D. Prevailing Plaintiff or Prevailing Party

The general principle in civil rights cases is that unless manifest injustice would result, prevailing plaintiffs should be awarded attorneys' fees.[45] This is true under section 1988 and section 3612(c), and was true under section 1982 before section 1988. Courts under all three statutes have examined what it means to "prevail." In *Marr v. Rife*,[46] a pre-section 1988 case under The Fair Housing Act and section 1982, the court stated that even a plaintiff who is only partially successful may be awarded attorneys' fees, but only in proportion to the extent that plaintif has prevailed.[47] Under section 1988 courts have not departed from the section 1982 and section 3612(c) analysis of "prevail."[48] The operative fact is success, and not at which stage or in what way success is achieved.[49] The fact that there has been no docket entry signifying success is not controlling.[50] It has been held that issuance of a preliminary injunction makes plaintiff the prevailing party under section 1988.[51] One rationale for denoting a party as having prevailed absent full litigation is so that prompt

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expense without any guarantee of remuneration." *Id.* at 712. The attorneys had worked for six years without any compensation. (Their fees were assessed against defendants without discussion of plaintiffs' ability to pay.)

Similarly, Lindy Bros. Bldrs., Inc. of Philadelphia v. Am. R. & S. Sanitary Corp., 487 F.2d at 168, although not under § 1988, is illustrative of the difference between "contingent fee agreement" and "contingent nature of success." This suit was a class action involving price fixing antitrust violations. The court awarded attorney's fees under the equitable fund doctrine. The court considered the contingent nature of success when making the award from a single fund created after negotiation on behalf of all claimants. The attorney had no private agreement which guaranteed payment of his fee even if no recovery were obtained. *Cf.* Preston v. Mandeville, 451 F. Supp. 617, 621 (S.D. Ala. 1978) (a jury selection case, "The attorney's fees in this case were entirely contingent pursuant to the Civil Rights Attorney's Fee Award Act.").

45. Mental Patients Civil Liberties Project v. Hosp. Staff, 444 F. Supp. 981, 986 (E.D. Pa. 1977).

46. 503 F.2d 735 (6th Cir. 1974).

47. *Id.* at 744. *See, e.g.*, Walker v. Fox, 395 F. Supp. at 1307.

48. *See, e.g.*, Hughes v. Repko, 578 F.2d at 486-87.

49. Schmidt v. Schubert, 433 F. Supp. 1115, 1118 (E.D. Wis. 1977); Parker v. Matthews, 411 F. Supp. 1059, 1063 (D.D.C. 1976) *aff'd sub nom.* Parker v. Califano, 561 F.2d 320 (D.C. Cir. 1977).

50. Buckton v. Nat'l Collegiate Athletic Ass'n, 436 F. Supp. 1258, 1264-65 (D. Mass. 1977) suit under 1983). *See generally* 13 Words and Phrases, Docket Entry, 170 (1965) (not a judgment *per se*, but a minute of action taken by the court).

51. Williams v. Anderson, 562 F.2d 1081, 1102 (8th Cir. 1977) (action under § 1183); Buckton v. NCAA, 436 F. Supp. at 1265.

settlements will not be discouraged.[52] The argument that plaintiffs settled litigation by voluntary agreement has not been held a bar to recovery under section 1988.[53]

It is within a court's discretion to award attorneys' fees under section 1988 and section 3612(c). In some cases in which plaintiffs have prevailed, courts have declined to award such fees because special cirumstances would have made such an award unjust.[54] The precise meaning of "special circumstances" is not settled by case law. The court in *Miller v. Amusement Enterprises, Inc.*,[55] claiming reliance on *Newman v. Piggie Park Enterprises, Inc.*,[56] concluded that a nonfrivolous defense did not amount to special circumstances. The statement in *Newman* which caused the inconsistent conclusions is, "[T]he respondents' interposed defenses [are] so patently frivolous that a denial of counsel fees would be manifestly inequitable."[57] At present, the status of a nonfrivolous defense remains unclear.

One of the facial differences between section 1988 and section 3612(c) is that section 3612(c) allows recovery to only prevailing plaintiff, while section 1988 permits an award to the prevailing party, whether plaintiff or defendant. Under section 1988 different standards have been applied in making an award to a prevailing plaintiff than to a prevailing defendant. While a prevailing plaintiff must show that an award is not precluded by special circumstances that would make the award unjust,[58] courts have held that a prevailing defendant must additionally demonstrate that plaintiff's claim was "frivolous, unreasonable or groundless or . . . that plaintiff continued to litigate after it clearly became so."[59] Although defendant's burden of proof sounds similar to the

52. Pennsylvania v. O'Neill, 431 F. Supp. at 705. (Rejecting defendant's contention that attorneys' fees should be reduced to reflect obstruction to settlement).

53. Brown v. Culpepper, 559 F.2d 274, 277 (5th Cir. 1977); Mental Patients Civil Liberties Project v. Hospital Staff, 444 F. Supp. at 986.

54. *See, e.g.*, Green v. Ten Eyck, 572 F.2d 1233, 1243 (8th Cir. 1978); Bond v. Stanton, 555 F.2d 172, 174 (7th Cir. 1977), *cert. denied*, 98 S. Ct. 3146 (1978); Sprogis v. United Air Lines, Inc., 517 F.2d 387, 391 (7th Cir. 1975).

55. 426 F.2d 534, 538 (5th Cir. 1978).

56. 390 U.S. 400 (1967).

57. *Id.* at 402 n.5.

58. *See* note 54 *supra*.

59. S. Rep. No. 94-1011, 94th Cong., 2d Sess. 5 *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 5908, 5912. *See, e.g.*, Christiansburg Garment Co. v. EEOC, 98 S. Ct. 694, 700 (1978), under The Civil Rights Act of 1964; Lopez v. Arkansas County Independent School Dist., 570 F.2d 541, 545 (5th Cir. 1978); Carrion v. Yeshiva Univ., 535 F.2d 722, 729 (2d Cir. 1976).

bad faith exception to the American rule, it has been distinguished from that exception by several courts.

> The fact that Congress intended 1988 to benefit defendants under any circumstances indicates that the standards to be applied in favor of defendants must be more liberal than bad faith, otherwise the statute would be logically redundant and unnecessary given the courts' equity powers to award attorneys' fees under the American rule.[60]

Prevailing plaintiff has been further distinguished from prevailing defendant by noting that defendant is rarely viewed as being "cloaked in a mantle of public interest pursuing substantial public policies,"[61] while plaintiff generally is.

E. Free Legal Services

Most courts agree that the fact that a prevailing party is represented by a nonprofit legal services organization which does not bill for its services, does not preclude an award of attorneys' fees.[62] A literal reading of section 3612(c) and section 1988 does not indicate otherwise.[63] It has been held that to deny attorneys' fees on the ground that legal services are provided at no charge would indirectly cripple the enforcement scheme designed by Congress by discouraging private and public services attorneys from taking civil rights cases.[64] At least one district court declined to allow recovery to an ACLU volunteer attorney who planned to turn over all of the fees awarded to him to an "unrelated charity."[65] However, this was reversed on appeal to the Fourth Circuit where it was held that attorneys' fees should not be reduced or disallowed because an attorney has agreed in whole or in part to contribute that fee to a civil rights organization.[66]

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60. *See* (Civil Rights Act of 1964 cases) Christiansburg Garment Co. v. EEOC, 98 S. Ct. at 698; Newman v. Piggie Park Enterprises, Inc., 390 U.S. at 402; Chin v. Kauikeolani Childrens Hospital, 445 F. Supp. 1375, 1376 (D. Haw. 1978); Goff v. Texas Instruments, Inc., 429 F. Supp. 973, 975 (N.D. Tex. 1977).

61. Hughes v. Repko, 429 F. Supp. at 931.

62. *See, e.g.*, Alsager v. Dist. Ct. of Polk County, Iowa, 447 F. Supp. 572, 577 (S.D. Iowa 1977).

63. See notes 1, 2, 4 *supra;* Lund v. Affleck, 442 F. Supp. at 1112.

64. Hairston v. R & R Apts., 510 F.2d at 1092; Bradenburger v. Thompson, 494 F.2d 885, 889 (9th Cir. 1974).

65. Tillman v. Wheaton-Haven Rec. Ass'n, 367 F. Supp. at 867.

66. 517 F.2d 1141, 1148 (4th Cir. 1975) *rev'g* 367 F. Supp. 860 (D. Md 1973); *Accord,* Schmidt v. Schubert, 433 F. Supp. at 1117; Pennsylvania v. O'Neill, 431 F. Supp. at 706 n.1.

F. Reasonable Awards

Section 1988 and section 3612(c) require that attorneys' fees awards be reasonable, but they are silent on how to judge reasonableness. Courts have generally looked to the following twelve factors in evaluating reasonableness under both acts. 1) time and labor required, 2) the novelty or difficulty of the questions involved, 3) the skill requisite to perform the legal service properly, 4) the preclusion of other employment by the attorney due to the acceptance of the case, 5) the customary fee, 6) whether the fee is fixed or contingent,[67] 7) time limitations imposed by the client or the circumstances, 8) the amount involved and the results obtained, 9) the experience, reputation and ability of the attorney, 10) the undesirability of the case, 11) the nature and length of the professional relationship with client, 12) wards in similar cases. The twelve factors are used by courts as guidelines, including the Ninth Circuit, under sections 1982, 1988 and 3612(c).[68]

G. Conclusion

The lack of uniformity between section 3612(c) and section 1988, specifically the financial status clause, has led to inconsistent results in housing discrimination cases based on race. This is demonstrated by the hesitancy and evasiveness with which some courts have addressed recovery. Court have interpreted the attorneys' fees requirements differently under sections 1982 and 3612(c).[69] Section 1988, instead of bringing clarity, perpetuates two separate standards for recovery.

In drafting The Fair Housing act of 1968, Congress had a chance to make its enforcement provisions applicable to sections 1982, but declined to do so.[70] In drafting the Civil Rights Attorneys' Fees awards Act of 1976, Congress again had the opportunity to eliminate the well documented confusion as evidenced by disparate treatment of prevailing plaintiffs suing for the identical civil rights violation. Again Congress declined to do so. There is

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67. *See* note 44 *supra* and accompanying text.

68. Fountila v. Carter, 571 F.2d at 496; King v. Greenblatt, 560 F.2d 1024, 1026 (1st Cir. 1977); Rainey v. Jackson State College, 551 F.2d 672, 676 (5th Cir. 1977); Kerr v. Screen Extras Guild, 526 F.2d 67, 70 (9th Cir. 1975); Johnson v. Georgia Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974); Preston v. Mandeville, 451 F. Supp. at 620-23. *Cf.* Lund v. Affleck, 442 F. Supp. at 1115 (approved but declined to consider all twelve points).

69. The punitive damages provision has been interpreted differently, too. Under § 3612(c) there is a $1000 maximum, while § 1982 is silent on the issue of punitive damages.

70. *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 415-17 (1968).

no demonstrable benefit in requiring plaintiffs to choose between remedies or to require the courts, without congressional guideance, to make sense or uniformally interpret the inconsistencies.

Wendy Maurice

V. THE NINTH CIRCUIT WRESTLES WITH THE QUESTION OF STANDING UNDER TITLE VII

A. INTRODUCTION

In *Chavez v. Tempe Union High School District,*[1] the Ninth Circuit reviewed a district court's decision in a Title VII action. The opinion sought to explain the plaintiff's lack of standing, but instead, unnecessarily blurred the distinction between standing requirements and the ability of a plaintiff to act as a class representative.

B. BACKGROUND

Prior to the opening of the Tempe Union High School District in 1968, notices of teaching openings were circulated within the district, and the school's principal-elect selected teachers and acting department heads from the applications submitted by teachers within the district. One year later the principal appointed the acting chairperson of the language department to permanent chairperson of the department without further advertising or recruiting.[2]

Chavez, a language teacher with many years of experience within the district, brought suit under Title VII of the Civil Rights Act of 1964,[3] and 42 U.S.C. § 1983,[4] against the Tempe Union High School District and the principal of the high school. The plaintiff alleged, *inter alia*, that the employment practices of the district were impermissibly discriminatory because the

1. 565 F.2d 1087 (9th Cir. Dec., 1977) (per Wallace, J.; the other panel members were Chambers, J. and Crary, D.J.)

2. At the time the high school opened, the formal qualifications for department chairperson included "[a] minimum of five (5) years teaching experience," and "[a] Masters Degree in the subject area [of the department] or an appropriate number of years of successful teaching experience." *See* 565 F.2d at 1090 n.1. When the acting chairperson assumed the role of permanent chairperson, she did not have the requisite number of years of teaching experience, nor had she completed her Masters Degree. She had, however, completed a portion of the work for a Masters Degree. *Id.*

3. §§ 701-16, 42 U.S.C. §§ 2000e to 2000e-15 (1970).

4. Civil Rights Act of 1871, § 1, 42 U.S.C. § 1983 (1970).

school district's failure to properly publicize the opening of the permanent position of department head was a breach of its duty to recruit minorities.

The court first found that because the plaintiff had notice of the initial teaching positions, she had suffered no discrimination in initial hiring. The court also found that the plaintiff could not attack the hiring practices, assuming *arguendo* they were discriminatory, because she would, in effect, be raising the rights of hypothetical third parties who had no opportunity to learn about the department head positions because they were not teachers in the district. Since the plaintiff was a teacher in the district, the court held she had no standing to raise this issue on behalf of these third parties.[5]

C. The Issue of Standing

In attempting to attack the hiring procedures of the district the plaintiff was implicitly asserting her right to sue on behalf of those previously aggrieved by the alleged discriminatory employment practices. The question presented was whether she had standing to raise those issues.

When a plaintiff brings a Title VII action and the complaint includes both individual as well as classwide or broad discriminatory allegations, the court has a twofold inquiry as to whether a plaintiff has standing to sue. The court must first determine if the plaintiff has met the article III case and controversy requirement

5. The Ninth Circuit also concluded that the district judge had not abused his discretion by awarding costs to the defendants as the prevailing parties in the case even though the Ninth Circuit in Fountain v. Safeway Stores, Inc., 555 F.2d 753 (9th Cir. 1977) had recently upheld a lower court judge in disallowing an award of costs and attorney's fees to an employer as the prevailing party under § 706(k) of title VII. It should also be observed that the Supreme Court recently reiterated and strengthened the standards for assessing attorney's fees as part of the costs against plaintiffs. *See* Christianburg Garment Co. v. EEOC, 434 U.S. 412 (1978). Relying upon strong equitable considerations, the Court emphasized that: (1) the plaintiff is the chosen instrument of Congress to vindicate "a policy that Congress considered of the highest priority" and, (2) when a district court awards fees to a prevailing plaintiff it is awarding them "against a violator of federal law." *Id.* at 418. The Court reasoned that a plaintiff should not be assessed his opponent's attorney's fees unless a court finds that the claim was "frivolous, unreasonable or groundless, or that the plaintiff continued to litigate after it clearly became so." *Id.* at 422. The Court thus adopted the concept embraced in the language of two courts of appeals: "unfounded, meritless, frivolous, vexatiously brought or unreasonable." United States Steel Corp. v. United States, 519 F.2d 359 (3d Cir. 1975); Carrion v. Yeshiva University, 535 F.2d 722 (2d Cir. 1976). *Id.* at 421. In applying these criteria the Court stressed that litigation is rarely predictable suggesting that a plaintiff's claim is entitled to a presumption of reasonableness. *Id.* at 422.

and thus has standing to sue either by a showing of: 1) a direct injury, or 2) an indirect injury which is the impairment of her enjoyment of a discriminatory free working environment.[6] Thereafter, if allegations of a class nature are also included, the court must then determine if the plaintiff is the proper class representative.[7] Even though a plaintiff may fail to prove her direct individual allegations, she may nonetheless meet the case and controversy requirement of article III and have standing to sue based on the class allegations.[8]

Case and Controversy and Title VII

For a federal court to have jurisdiction, the Constitution requires that a plaintiff claim enough injury to present a genuine "case and controversy" within the meaning of article III of the

6. Justice White in dissenting to the court's expansive construction of article III case or controversy requirement in Sosna v. Iowa, 419 U.S. 393, 410 (1975), nontheless recognized an even broader definition of standing for Title VII purposes when he stated:

> In [Title VII] cases, Congress has expressed an intention and provided that any person "claiming to be aggrieved" could bring suit under Title VII to challenge discriminatory employment practices . . . . Since any discrimination in employment based upon sexual or racial characteristics aggrieves an employee or an applicant for employment having such characteristics by stigmatization and explicit or implicit application of a badge of inferiority, Congress gave such persons standing by statute to continue an attack upon such discrimination even though they fail to establish particular injury to themselves in being denied employment unlawfully.

Id. at 413 n.1. *citing* Trafficante, 409 U.S. 205 (1972). *See* Novotny v. Great American Federal Savings and Loan Association, 584 F.2d 1235 (3d Cir. 1978) (en banc). In *Novotny* a male employee was permitted standing to raise the § 1985(2) claim even though the animus toward females was not directed at him. In deciding that the male plaintiff also had a cause of action under § 704(a) of title VII, even though his discharge was not the result of involvement in any formal EEOC proceeding, the court recognized the prospect of a greater burden of litigation. However, a unanimous court stated the possibility of abuse by a litigious plaintiff cannot justify withdrawal of that bulwark. In reconciling the explicit statutory mandate of § 704(a) with an opaque legislative history, the court succinctly justified its broad interpretation by recalling history.

> [T]he statutory landscape is illuminated by the community's goals as well as the emanations of legislative history. To hobble the legislation before us would without justification, set judicial authority against the effort to achieve equality of rights. We do not believe such was the intent of the Congressmen who in the aftermath of the Civil War began the task nor of their successors in 1964 who mandated its continuance.

Id. at 1261-62.

7. Fed. R. Civ. P. 23(c)(1) provides that "[a]s soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained . . . ."

8. *See generally* cases cited at notes 22, 24, 26 *infra.*

United States Constitution.[9] When a plaintiff brings a Title VII action, he or she must demonstrate article III standing by proving that he or she is a "person aggrieved" within the meaning of section 706(b) of Title VII.[10] Once it is determined that Title VII litigants have alleged they are "aggrieved,"[11] the standing inquiry

9. *See* Flast v. Cohen, 392 U.S. 83 (1968). "Justiciability is the term of art employed to give expression to this dual limitation [questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process] placed upon federal courts by the case-and-controversy doctrine." *Id.* at 95. *Flast* describes the subtle pressures which tend to cause policy considerations to blend into constitutional limitations such as: "[A] general standing limitation imposed by federal courts is that a litigant will ordinarily not be permitted to assert the rights of absent third parties . . . However, this rule has not been imposed uniformly as a firm constitutional restriction on federal court limitation . . . ." *Id.* at 99 n.20. *See, e.g.*, Warth v. Seldin, 422 U.S. 490, 498 (1975); Baker v. Carr, 369 U.S. 186, 204 (1962). (The question is whether the plaintiff has "alleged such a personal stake in the outcome of the controversy" to warrant his invocation of federal court jurisdiction and to justify exercise of the court's remedial powers on his behalf.)

The constitutional limitation of federal jurisdiction to cases and controversies engenders the rule of standing that the plaintiff must show actual or threatened injury to himself that is likely to be redressed or avoided by a favorable decision. *See* Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977); Village of Bellwood v. Gladstone Realtors, 569 F.2d 1013 (7th Cir. 1978), *cert. granted*, 436 U.S. 956 (1978), *citing* Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 38 (1976); Warth v. Seldin, 422 U.S. 498, 505 (1975).

The question of standing does not turn on whether the plaintiff ultimately prevails. *See* Flast v. Cohen, 329 U.S. 83; Village of Bellwood v. Gladstone Realtors, 569 F.2d 1013 (7th Cir. 1978), *cert. granted*, 436 U.S. 956; League of United Latin American Citizens v. City of Santa Ana, 410 F. Supp. 873 (C.D. Cal. 1976).

10. § 706(b), 42 U.S.C. § 2000e-5(b) (Supp. IV 1974) provides in pertinent part:

> Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice . . . .

11. For example, Hackett v. McGuire Bros. Inc., 445 F.2d 442 (3rd Cir. 1971), was the first circuit to focus on the remedies section of the Act. Thus, *Hackett* noted:

> The remedies section is § 706, 42 U.S.C. § 2000e-5. That section permits "a person claiming to be aggrieved" to file a charge with the Commission . . . . A person claiming to be aggrieved may never have been an employee of the defendant. Indeed the Act forbids discrimination not only by employers, 42 U.S.C. § 2000e-2(a)(2), but also by potential employers, 42 U.S.C. § 2000e-2(a)(1), by labor organizations, 42 U.S.C. § 2000e-2(c) and by employment agencies, 42 U.S.C. § 2000e-2(b). An aggrieved person obviously is any person aggrieved by any of the forbidden practices.

Id. at 455. The Equal Employment Opportunity Act of 1972, P.L. 92-261, § 4, 86 Stat. 104, amended § 706, 42 U.S.C. § 2000e-5(b), to include a charge "filed by or on behalf of a" person claiming to be aggrieved. The amended provision clearly imports that Congress intended persons who are authorized to complain to the agency, the right also to bring actions under the statutory provision of the Act.

focuses on whether the rights they assert are "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."[12]

The *Chavez* result is typical of the federal courts' struggle with the amorphous standing concept which, under section 706(b) of Title VII, requires that a plaintiff be a "person aggrieved" by *any* of the forbidden employment practices. The person claiming to have been aggrieved may never even have been an employee of the defendant since section 706(b) allows suit to be brought not only by those having an employment relationship with the defendant but those having a potential employment relationship.[13]

The confusion in *Chavez* is also shared by other circuit courts. Most notably, in *Satterwhite v. City of Greenville,*[14] the Fifth Circuit judges en banc vacated the decision of the Fifth Circuit panel which had previously held that the plaintiff had standing to sue and could represent the class.[15] The court ignored the article III issue presented and instead determined that the plaintiff was not a proper class representative and thus could not maintain the suit.[16] The Fifth Circuit fell prey to the identical

12. *See* Association of Data Processing Service Org. Inc. v. Camp, 397 U.S. 150, 153 (1970).

13. *See* note 11 *supra* and accompanying text.

14. 578 F.2d 987 (5th Cir. 1978) (rehearing en banc).

15. *Id.* at 991.

16. *Id.* The court concluded that the plaintiff was not a proper class representative because she neither had claims typical of the members of the class nor had an adequate common interest or nexus with them. The court went on to state that they need not reach the issue whether the plaintiff had the requisite standing to sue under article III, section 2 of the Constitution. The majority in *Satterwhite* reasoned that the plaintiff's claim was more like that of the plaintiffs in *Rodriguez,* in that she never had any nexus or homogeneity of interest with the class. The dissent however, noted that the plaintiff in *Satterwhite* sought to represent a class composed of all present and prospective female employees of the city allegedly victimized by (1) a discriminatory hiring policy, (2) sexually segregated job classifications, and (3) a discriminatory compensation scheme. The dissenting opinion went on to point out that she was exactly within (1), for she was a female, a prospective employee, and a person who claimed she didn't get the job she applied for because of the employer's policy against hiring females. In short, she asserted sex discrimination in hiring, job assignment and pay, directed against females, on behalf of applicants and of those already employed. *Id.* at 1000-01.

In this respect, it is important to note two recent Supreme Court decisions, Coopers and Lybrand v. Livesay, 98 S. Ct. 2454 (1978) and Gardner v. Westinghouse Broadcasting Co., 98 S. Ct. 2451 (1978) holding that a district court order denying certification is not appealable as a final order under 28 U.S.C. § 1291. Either plaintiff or defendant may move for a determination under rule 23(c)(1) whether the action is to be maintained as a class action. *See* WRIGHT & MILLER, 7A FEDERAL PRACTICE AND PROCEDURE § 1785 at 128. From a practical standpoint the defendant would bolster his or her position by moving for

confusion illuminated in *Chavez,* that is, reliance on *East Texas Motor Freight System, Inc. v. Rodriguez,*[17] a rule 23 case, when the real question was one of standing.

D. Standing and Class Representation—Separate Issues

In *Chavez,* the court erred in that the focus of their inquiry should have been on whether the plaintiff had demonstrated that she was a "person aggrieved" within the meaning of section 706(b) rather than on whether she could serve as an adequate class representative.[18] The court appears to have wrestled with the notion that the plaintiff was attempting to assert the rights of others, and either overlooked or ignored the article III case and controversy standing issue by relying on *Rodriguez* to deny the plaintiff the opportunity to litigate the class issues. At this stage, their resort to class representation standards was inappropriate. The court should have first determined if the plaintiff had standing to sue based on her allegations that other minority members had no opportunity to learn about the teaching openings, and thus the hiring procedures perpetuated the past discriminatory employment practices of the district.

Historically, the federal courts have recognized their obligation to further the intent of the Civil Rights Act by reasoning that those who file their underlying charge with the agency are generally lay complainants who are unfamiliar with the niceties of legal

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certification as soon as possible in order to avoid allowing the plaintiff to ready his or her case. *See* Cook County College Teachers Union, Local 1600 v. Byrd, 456 F.2d 882 (7th Cir. 1972), *cert. denied,* 409 U.S. 848 (1972); McDonald v. General Mills, Inc., 387 F. Supp. 24 (E.D. Cal. 1974).

17. 431 U.S. 395 (1977). The plaintiffs in *Rodriguez* had stipulated that they had not been discriminated against when they were first hired thus they could hardly represent a class of drivers who purportedly would have had to have been discriminated against at the time of hire in order to be locked into a "no transfer" type position. *Id.* at 399. The *Rodriguez* plaintiffs also restricted their proof at trial to their individual claims and did not move for class certification. Accordingly, the trial court focused on whether the company's failure to consider their individual line-driver applications violated Title VII. *Id.* at 400. On appeal, the Fifth Circuit certified the class on its own motion. The Supreme Court reversed stating that by the time the case had reached the Fifth Circuit it was evident the named plaintiffs were not proper class representatives. *Id.* at 403. However, the issue presented on review was whether the circuit court had erred in certifying the class, not whether the plaintiffs had standing.

18. The rationale stated for denying the plaintiff in *Chavez* the opportunity to raise a claim premised on perpetuation of past discrimination in initial teacher hiring, was that she had no *standing,* but the only authority cited was *Rodriguez. Rodriguez,* however, rests exclusively on rule 23 grounds rather than denial of standing to sue based on the constitutional *case and controversy* requirement of article III.

proceedings and acting without assistance of counsel.[19] The scope of the resulting litigation has been directly related to the scope of the EEOC investigation reasonably expected to grow out of the charge of discrimination.[20] The result has often been broad based claims with several issues present.[21] Moreover, the wealth of title VII litigation has repeatedly allowed a named plaintiff to represent a class of past, present and future employees.[22]

The Ninth Circuit itself, in its 1976 pioneer decision of *Waters v. Heublein,*[23] concluded that a white female had standing to enjoin discrimination against groups to which she did not belong because she was a "person claiming to be aggrieved" by such discrimination. In *Waters,* the court looked to the statutory provisions of the 1964 Civil Rights Act and reasoned that the term "person aggrieved" for purposes of standing to sue, included per-

19. *See* Tipler v. E.I. duPont deNemours & Co., 443 F.2d 125 (5th Cir. 1971); Sanchez v. Standard Brands, Inc., 431 F.2d 455 (5th Cir. 1970), *cf.* EEOC v. Bailey Co. Inc., 563 F.2d 439 (6th Cir. 1977) (portion of complaint exceeded scope of investigation).

20. *See* note 19 *supra.*

21. *See* Gay v. Waiters' and Dairy Lunchmen's Union, Local No. 30, 549 F.2d 1330 (9th Cir. 1977); Senter v. General Motors Corp., 532 F.2d 511 (6th Cir. 1976), *cert. denied,* 429 U.S. 870 (1976); Huff v. N.D. Cass Co. of Alabama, 485 F.2d 710 (5th Cir. 1973) (en banc).

22. *See* EEOC v. Bailey Co. Inc., 563 F.2d 439 (6th Cir. 1977) (the court reasoned that the existence of public enforcement under Title VII "cannot be a basis for interpreting more narrowly the 'person aggrieved' language of title VII." *Id.* at 453. Hence, a white female employee was granted standing to litigate on behalf of black females); Roberts v. Union Co., 487 F.2d 387 (6th Cir. 1973) (female employee attacked discriminatory classification and wage policies as well as hiring policy. Asserted class was not limited by current female employees but emcompassed all females who might have been injured by employer's discriminatory policies); Moss v. Lane Co., Inc., 471 F.2d 853 (4th Cir. 1972) (subsequent dismissal or mootness of individual claim, particularly in a discrimination case, will not operate as a dismissal or render moot the action or destroy the plaintiff's right to litigate the issues on behalf of the class); Dickerson v. U.S.Steel Corp., 439 F. Supp. 55 (E.D. Pa. 1977)

Nothing in *Rodriguez* demands that each class member's claim be virtually interchangeable or that each individual claim be factually identical to that of the named representative Young v. Victoria Station, 17 Empl. Prac. Cas. § 8513 (S.D. Tex. 1977) (court guided initially by the remedial policies underlying rule 23. If proof at trial indicates that certified class fails to satisfy rule 23 requirements, the court will modify order.) *But see,* Vun Cannon v. Breed, 565 F.2d 1096 (9th Cir. 1977). In *Vun Cannon* the Ninth Circuit noted that intervening decisions of the Supreme Court indicated that the mooting out of plaintiff's individual claim barred the plaintiff from continuing to litigate that claim as a representative of the class. *Id.* at 1098. Although the Ninth Circuit did recognize that the threshold question was whether there was an adversary party which is necessary for the creation of the constitutionally required case or controversy, their underlying reasoning was once again shaped by reliance on *Rodriguez.*

23. 547 F.2d 466 (9th Cir. 1976), *cert. denied,* 433 U.S. 915 (1977). Waters was a white woman seeking to enjoin employment discrimination against females, blacks and hispanic-americans.

son not themselves the objects of discrimination who were injured by the loss of important benefits from interracial associations.[24] The *Waters* court found that a natural relationship existed between housing and employment discrimination and concluded that Waters' Title VII standing was logically indistinguishable from the Title VIII standing issue in *Trafficante v. Metropolitan Life Insurance Company.*[25] In *Trafficante,* the Supreme Court had emphasized that although minority groups were damaged the most from discrimination in housing practices those who were not the direct objects of discrimination had an interest in ensuring fair housing.[26] The *Trafficante* court then granted standing to both a black tenant and a white tenant since the court reasoned they too were deprived of the important social benefits that arise by virtue of living in an integrated community. Further, both the *Trafficante* and the *Waters* decisions acknowledged that their extension of the term "person aggrieved" was based on a Third Circuit Title VII action.[27]

Although, the Ninth Circuit's illustrious opinion in *Waters* did not resolve all the controversy surrounding the standing inquiry,[28] that court did recognize that the threshold question was

24. In his concurring opinion, Judge Pregerson noted that he had previously taken an overly restrictive view of standing and Fed. R. Civ. P. 23(a)(2)'s requirement of common questions of law and fact. In Burney v. North American Rockwell Corp., 302 F. Supp. 86 (C.D. Calif. 1969), Judge Pregerson had treated the plaintiff's ability to "fairly and adequately" represent a class as a subset of standing. He noted his inquiry should have "rested solely on his determination that the named plaintiff failed to show that he could fairly and adequately protect the interests of the class." *Id.* at 470.

25. 409 U.S. 205 (1972).

26. *Id.* The plaintiffs alleged they had lost the social benefits of living in an integrated community. They sued under title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601-17. In granting standing to sue to a white tenant and black tenant, the court noted the enormity of the task of assuring fair housing, thus complainants must often act on their own behalf "as private attorneys general in vindicating a policy that Congress considered to be of the highest priority." *Id.* at 211. A unanimous Supreme Court held that the term "person aggrieved" in 42 U.S.C. § 3610(a) included persons not themselves the objects of discrimination, who are injured "by the loss of important benefits from interracial associations." 409 U.S. at 209, 210. The court emphasized that while minority groups were damaged the most from discrimination in housing practices, that those who were not the direct objects of discrimination had an interest in ensuring fair housing.

27. *See* Hackett v. McGuire Bros., Inc., 445 F.2d 442 (3d Cir. 1971).

28. Waters v. Heublein, Inc., 547 F.2d 466 (9th Cir. 1976), *cert. denied,* 422 U.S. 915 (1977) and Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972), are both based on loss of important benefits by being deprived of social contact with members of minority groups. The court did not elucidate as to equal pay, promotion or terms and conditions allegations that are brought on behalf of minority groups. The trend, however, appears to permit a broad, reasonably related, approach. *See* EEOC v. Bailey, Inc., 563 F.2d 439 (6th Cir. 1977).

whether the plaintiff had demonstrated that she was a "person aggrieved."

How broad the congressional grant of standing under section 706(b) really is remains unresolved. If the court looks to history and recalls the Supreme Court's *Trafficante* decision, it is clear that Title VII litigants have had their right to their day in court severely diluted by the *Chavez* reasoning.

The fact that the plaintiff in *Chavez* was an Hispanic-American attempting to assert discriminatory hiring practices compels the conclusion that she met the requirements of article III because these are precisely the rights Title VII was intended to protect. Accordingly, once the *Chavez* court had resolved the standing inquiry, the proper course was to have remanded the case to the district court to determine if the plaintiff was an adequate class representative.[29]

E. Conclusion—Bifurcate the Standing and Class Representation Issues

With the stakes set so high, the alternative may be to bifurcate the issue of standing and adequate class representation so the focus will be on the proper issue. Title VII litigants who would have standing under the rationale of *Trafficante* should not have the emanations of *Rodriquez* pronounce an early death to their

29. *See, e.g.*, Goodman v. Schlesinger, 584 F.2d 1325 (4th Cir. 1978) (remanding to the district court, in the face of Rodriguez, with instructions that the class action be retained on the docket for a reasonable time to permit the presentation of a proper person to step forward as a proper plaintiff or plaintiffs with grievances similar to those of the original plaintiffs whose claims had been dismissed). The court discussed the controversy by noting: "It is true that some of the language in East Texas Freight (Rodriguez) may seem to indicate that we should affirm the dismissal of the class action as the Satterwhite en banc decision held . . . . Nevertheless, the [Supreme Court's] citation in its note 12 of Cox, with apparent approval, gives us pause, and thus we adhere to our precedent." *Id.* at 1333. In Cox v. Babcock & Wilcox, 471 F.2d 13 (4th Cir. 1972), the court remanded the case to the district court with instructions that the class action be retained on the docket for a reasonable time to permit the presentation of any proper claims for further relief under such class action and instructed that should no proper claims for further relief be presented within a reasonable time, the district court should strike the class action from the calendar and enter a final dismissal thereof. *Accord*, Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969). The court in *Johnson* held that an evidentiary hearing be conducted by the trial court as to the adequacy of class representation. *Rodriguez* appears to agree with the mandate of *Johnson* by requiring that the decision whether the named plaintiffs should represent a class is appropriately made on the full record. 431 U.S. at 406, n.12. The issue left unresolved by *Rodriguez* is what type of proof will be required at the evidentiary hearing and the type of proof that will be deemed sufficient to establish that the plaintiff is an adequate class representative.

action, or at the very least, the legal horizon should remain as unclouded as possible so that future litigants will remain advised of the path they are to walk.

Margie Valdez

VI. THE NINTH CIRCUIT REFINES ITS REQUIREMENTS FOR TIMELY INTERVENTION IN TITLE VII SETTLEMENT PROCEEDINGS

A. INTRODUCTION

In *Alaniz v. Tille Lewis Foods,*[1] the Ninth Circuit reviewed a district court's denial of an application to intervene in a Title VII action where the consent decree[2] had already been entered. The court took the occasion to emphasize the considerations it will look to in determining if an application for intervention has been filed in a timely fashion, but it failed to articulate how the factors would be applied.

B. BACKGROUND

The plaintiffs, representing a class of female and minority cannery workers, filed their original complaint in 1973.[3] They charged the employers and unions of some seventy-four food processing and canning plants in Northern California, and the industry-wide collective bargaining agents, with denying them the opportunity to obtain higher paying and year-round positions within the canning industry.[4] During the pendency of the private action, the defendants were also engaged in a conciliation process with the Equal Employment Opportunity Commission (EEOC).

1. 572 F.2d 657 (9th Cir. Feb., 1978) (per curiam the panel members were Wright and Anderson, JJ. and Whelan, D.J.), *cert. denied,* 98 S.Ct. 123 (1978).

2. A consent decree, like a settlement, settles a civil action; however, it is filed with the court to give the court continuing jurisdiction over the signatories and to insure that it is complied with. A settlement agreement on the other hand is usually associated with pre-suit activity and is a contractual agreement only between the parties.

3. The plaintiffs amended their original complaint on February 21, 1975, to include as defendants the California State Council of Cannery and Food Processing Unions, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (State Council) and California Processors, Inc. The State Council serves as the authorized collective bargaining agent for the thirteen local unions which represent employees in the canning industry. California Processors, Inc., is the authorized collective bargaining agent for 29 companies which operate some 70 canning facilities in Northern California. *See* Alaniz v. California Processors, Inc., 73 F.R.D. 269, 272 (N.D. Cal. 1976).

4. All the defendant employers and local unions operate under the terms of an industry-wide collective bargaining agreement. *Id.* at 273.

The conciliation process and the private action addressed substantially the same alleged discriminatory activity.[5]

In 1974, the plaintiffs were invited by the defendants to join the conciliation negotiations being conducted with the EEOC. These combined negotiations culminated in February, 1975 when the private parties and the EEOC entered into a proposed settlement agreement. After extensive, well-publicized industry-wide negotiations, the court approved settlement agreement and consent decree became effective June 15, 1976.[6]

On July 2, 1976, seventeen days after the consent decree had become effective, a motion to intervene was filed by a group of cannery workers seeking to protect their seniority.[7] The district court denied the intervention because the motion was untimely.[8] On appeal, the Ninth Circuit affirmed, specifically emphasizing the applicable timeliness considerations it would weigh where motions to intervene are filed after a consent decree has been filed.

C. The Question of Timeliness

Without specifying whether they wished to join the lawsuit as plaintiffs or defendants, the applicants sought leave to intervene as a matter of right under rule 24 of the Federal Rules of Civil Procedure,[9] two and one-half years after the lawsuit was filed, for the purpose of contesting the validity of the decree and protecting their seniority.[10] The crux of the applicants' argument was that they did not know the settlement decree would be to their detriment.

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5. *Id.*

6. 73 F.R.D. at 294.

7. 572 F.2d at 658.

8. 73 F.R.D. at 289.

9. Fed. R. Civ. P. 24 provides in pertinent part:

> (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

10. Some of the applicants were members of the original class and therefore bound by the original decree. *See* 572 F.2d at 658 n.1.

Rule 24 requires that an application to intervene under either section (a), intervention of right, or section (b), intervention by permission, be timely filed.[11] Thus, before approving an application for intervention, the court must first be satisfied that the application is timely, based on all the circumstances.[12] Denial of intervention for untimeliness lies within the sound discretion of the court and is subject to review only for abuse of that discretion.[13] In Title VII cases, intervention after the entry of a consent decree has been permitted for the purpose of providing those persons who claim to be adversely affected by the decree the opportunity to assert their specific complaints as to certain fundamental matters.[14]

By comparison, before affirming a challenged employment discrimination settlement, the Ninth Circuit has entertained a broader, more encompassing review—a trend that would comport with fundamental due process requirements. Two major decisions reflect this trend. In *Mandujano v. Basic Vegetable Products,*[15]

11. *See* 7A, WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE, § 1916 at 572 (1972). *See* also United Air Lines v. McDonald, 433 U.S. 385 (1977); NAACP v. New York, 413 U.S. 345, 365-66 (1973); Pennsylvania v. Rizzo, 530 F.2d 501, 506 (3d Cir.), *cert. denied,* 426 U.S. 921 (1976).

12. NAACP v. New York, 413 U.S. 345, 365-66 (1973).

13. *Id.*

14. *See* United States v. Allegheny-Ludlum Industries, Inc., 63 F.R.D. 1 (N.D. Ala. 1974), *aff'd* 517 F.2d 826 (5th Cir. 1975), *cert. denied,* 425 U.S. 944 (1976). Consent decrees were entered on April 12, 1974. By May 17, 1974, several groups of individuals and organizations sought to intervene and vacate the decrees. The district court permitted only those individuals aggrieved pursuant to § 706(f)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f)(1) (1976), to intervene as a matter of right within the meaning of rule 24(a)(1). Such intervention, however, was permitted for the limited purposes of seeking to stay or vacate the consent decrees and to question the contemplated releases of backpay claims. The Fifth Circuit affirmed on appeal. As to the National Organization for Women, the court noted they had filed their application for intervention timely within the meaning of rule 24(a)(1) or (2), however, the organization was nonethelss prohibited from intervening as a matter of right. The Fifth Circuit rejected the district court's person aggrieved rationale and instead reasoned that since the action was a "pattern or practice" action brought by the EEOC under § 707, Congress had not conferred any unconditional right of intervention upon any private individual or association under § 707. In fact, § 707 is "conspicuously silent with regard to intervention." *Id.* at 842.

15. 541 F.2d 832 (9th Cir. 1976). *Mandujano* recognized that

> [i]t is imperative . . . to assure that before settlements receive judicial approval the court be well-informed of the views of those who feel they are being called upon to make the sacrifices. Only by being so informed can the court be certain that the settlement does not compromise the legal rights of class members without their consent. Such a compromise is a violation of due process. Mullane v. Central Hanover Bank & Trust, 339 U.S. 306 (1950) . . . . To provide the protection to which dissident rule 23(b)(2) class members are entitled and to assist the

the Ninth Circuit reasoned that a court approved settlement could be successfully challenged where a significant number of the class objected to the settlement. In *United States v. Navajo Freight,*[16] the Ninth Circuit reversed a district court order that failed to expressly consider the effect of the settlement on the non-class members. This trend was also reflected in the district court denial of intervention in *Alaniz* when Judge Orrick reiterated the Ninth Circuit hearing and notice requirements before approving settlement by relying on *Mandujano* and *Navajo Freight.*[17] In spite of Judge Orrick's assurance that the import of *Mandujano* and *Navajo Freight* had been complied with in *Alaniz,* he nonetheless appeared to be content with borrowing the standard for timely review of Title VII settlements enunciated in Judge Trask's dissent in *Mandujano.* He concluded that applications for intervention will be judged as untimely if it can reasonably be asserted that the applicants knew or should have known of their rights long before making application and slept on them.[18]

On appeal, the Ninth Circuit departed somewhat from the single timeliness standard announced by Judge Orrick and set out three factors it thought relevant in determining the timeliness issue, that is: 1) the stage of the proceedings; 2) prejudice to the parties and 3) length and reason for the delay.[19] The court then mechanically applied the timeliness factors to the case at bar and concluded that the applicants sought intervention two and one-half years after suit was filed and thus, either knew or should have known of the continuing negotiations and the resultant risks. The court then suggested that in order to protect their interests the

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courts in reviewing proposed settlements we believe certain procedural safeguards are necessary.

Id. at 835. The first safeguard was that notice be given in a form and manner that does not systematically leave an identifiable group without notice. The second safeguard was the notice must indicate that a member of the class can object to the proposed settlement and have an opportunity to be heard. *Id.*

16. 525 F.2d 1318 (9th Cir. 1975). In *Navajo Freight* the Government, Navajo and the Machinists had entered into a consent decree. Prior to the consent decree being entered the Teamsters moved for summary judgment on the ground that the local unions were indispensable parties under rule 19. Their motion was denied and the trial court subsequently issued the trial order. The Teamsters appealed both the denial of the summary judgment and the trial court modification of Navajo's seniority structure. The Ninth Circuit held that the trial court had failed to properly consider the seniority rights of non-minority road drivers who lost terminal seniority when they transferred to over-the-road driving jobs. *Id.* at 1327-28.

17. 73 F.R.D. at 293.

18. *Id.* at 294-95.

19. 572 F.2d at 659.

applicants should have joined the negotiations before the suit was settled.[20]

D. Timeliness Factors As Applied

The Ninth Circuit alluded to a rather narrow issue involving the timeliness of an application for intervention where a consent decree had been entered only after extensive, well-publicized industry-wide negotiations. The court's analysis, however, was rather vague and appears instead to capsulate the Ninth Circuit requirements for timely intervention.

Initially, the court relied on a commentator's reasoning that intervention of right motions should be treated more leniently than permissible intervention because serious harm is more likely to occur.[21] The *Alaniz* court then recited the three factors it would consider in determining if applications to intervene had been timely filed. The first factor, the state of proceedings, weighed heavily against the *Alaniz* applicants since their application was filed after the consent decree had been filed. To support their conclusion, the court relied on a 1955 Ninth Circuit decision.[22] However, timeliness is a shifting concept and courts have recognized that timeliness "is not a word of exactitude or of precisely measurable dimensions."[23]

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20. *Id.* Timeliness should not be judged in a vacuum. To suggest that the applicants should have joined the negotiations before the suit was settled necessarily implies that the applicants should have moved to intervene before the suit was settled, since this would be the only method of guaranteeing that their seniority rights would be protected. Such a rule induces mass protective motions to intervene in the event the named representatives' interests should run contrary to those of the class or non-class members.

21. *See* 7A, Wright & Miller, Federal Practice and Procedure, § 1916 at 573 (1972).

22. *See* Tesseyman v. Fisher, 231 F.2d 583 (9th Cir. 1955). The would-be intervenor, Tesseyman, had been found to have had no legal interest in the property which was the subject of the lawsuit at the trial level. Arguably, the applicant's motion was for permissive intervention and would not have been entitled to the judicial relaxation normally permitted as of right interventions.

23. McDonald v. E.J. Lavino Co., 430 F.2d 1065 (5th Cir. 1970). In *McDonald* the trial court had denied an insurance carrier's application to intervene as of right one day after trial and judgment for an injured employee. On appeal, the Fifth Circuit permitted intervention reasoning that the intervenor's application had neither (1) prejudiced the rights of the existing parties to the litigation, or (2) substantially interfered with the orderly processes of the court.

The *Alaniz* court relied on the *McDonald* decision to support their conclusion that denial weighs heavily against applicants where they desire to relitigate issues already determined. This reliance is questionable since in *McDonald* a trial was held on the merits. Indeed, the insurance carrier representative sat in the courtroom audience and heard the judgment. The applicants in *Alaniz*, however, never reached the trial stage. The settlement and consent decree disposed of their case. Similarly, as in *McDonald*, while it may have caused the trial court minor disruption, the applicants in *Alaniz* could hardly

At least in a Title VII context, the Supreme Court in *United Air Lines v. McDonald,*[24] shifted the emphasis from the knowledge of the pendancy of the law suit to knowledge that the applicant's interest would no longer be protected. It permitted an applicant to intervene three years after a denial of class certification. The Court reasoned that the critical factor for allowing intervention after final judgment was the fact that as soon as it became clear to the applicants that their interest would no longer be protected by the named class representative, the applicant moved to intervene to protect her interests.[25] The result was discarding the notion that timeliness is to be determined by relying on the time the applicant learned that the lawsuit was pending.

The line of reasoning was recently carried forward by the Fifth Circuit when it concluded that a rule "making knowledge of the pendency of the litigation the critical event would be unsound because it would induce both too much and too little intervention."[26] The net result would be inconsistent with the purposes of the rule 24 in fostering economy of judicial administration and protecting non-parties from having their interests effectively litigated away without their participation.[27]

In evaluating the second timeliness factor, the prejudice to the other parties in the lawsuit, the *Alaniz* court stressed the seriousness of the prejudice which results when long-standing ine-

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be attributed with seeking to relitigate an issue that had not yet been litigated by way of a trial. To expect would-be intervenors to anticipate that lawsuits will be settled by virtue of a consent decree rather than by way of trial is pure speculation and would hardly foster effective judicial administration.

24. 433 U.S. 385 (1977).

25. *Id.* at 394. Like *United Airlines,* the applicants' interests in *Alaniz* were purportedly being protected by the union and the EEOC in settlement negotiations. When the *Alaniz* applicants first learned that the consent decree would adversely affect their seniority they moved to intervene to protect their interests and appear to have satisfied the test of *United Airlines.*

26. Stallworth v. Monsanto, 558 F.2d 257, 264-54 (5th Cir. 1977). *Stallworth* held a rule making knowledge of the pendency of the litigation the critical event would

> encourage individuals to seek intervention at a time when they ordinarily can possess only a small amount of information concerning the character and potential ramifications of the lawsuit, and when the probability that they will misjudge the need for intervention is high. Often the protective step of seeking intervention will later prove to have been unnecessary, and the result will be needless prejudice to the existing parties and the would-be intervenor if his motion is granted, and purposeless appeals if his motion is denied.

Id. at 265.

27. *Id.* at 265.

quities are delayed. Since the decree was already being fulfilled the court felt to countermand the decree would create havoc and postpone the needed relief. Accordingly, in order for the applicants to have prevailed, the court reasoned they had to establish a *convincing* explanation for their delay.[28]

The Ninth Circuit reasoning with regard to the prejudice to the parties appears to run contrary to the Fifth Circuit reasoning of *Stallworth v. Monsanto*.[29] In *Stallworth*, the court intimated that to permit any additional prejudice factors, other than the prejudice which would result from the would-be intervenor's failure to request intervention as soon as he knew or reasonably should have known about his interest in the action, is to rewrite rule 24 since prejudice is a prerequisite to rule 24(b), permissive intervention, and should not be applied as rigidly in rule 24(a) of right interventions.[30]

Finally, as the basis for its third timeliness factor, the reason for and length of the delay, the court returned to the single timeliness standard the district court relied on (the dissent in *Mandujano*). The court concluded that the applicants knew of the negotiations and therefore the applicants should have moved to protect their interests sooner.[31]

E. Conclusion

Underlying the court's mysterious timeliness decision, one is compelled to conclude that the court did not want the applicants to play the role of spoiler in what had heretofore been a long and hotly contested struggle to reach a fair, reasonable and adequate settlement.[32] Because the Ninth Circuit must have considered the lower court decision flawed, they sought to refine and clarify the timeliness issue. By doing so, they institutionalized three rather

28. 572 F.2d at 659. *See* note 30 *infra* and accompanying text.

29. 558 F.2d at 257.

30. *See* 558 F.2d at 265. The *Stallworth* court concluded that "since section (b) provides that prejudice to the original parties must be considered when permissive intervention is sought, to take that same type of prejudice into account in the determining of timeliness would be to consider the same factor twice." *Id.*

31. The *Alaniz* court reasoned that the cannery worker undoubtedly discussed the effects of the lawsuit. 572 F.2d at 659.

32. *Stallworth* concluded that while the likelihood that intervention may interfere with orderly judicial processes may be considered by the district court in deciding to what extent an intervenor should be allowed to participate in the litigation, "it has nothing to do with timeliness." *Id.* at 266.

Moreover, when the courts begin to define legal standards in terms of the amount of speculation that has occurred, it reduces the order of proof to a swearing contest.

vague standards, some of which appear to be in conflict with other circuit courts, as well as adopting the minority view in one of their most recent decisions. The better course would have been to have stated simply that the district court had not abused its discretion in denying the intervention, leaving the important timeliness considerations for their deserved detailed analysis.

Review of settlement agreements and consent decrees imposes a tremendous responsibility on the court and correspondingly consumes and strains the court's time. However, when the issues that may affect all employees can be resolved in one lawsuit, rather than a multiplicity of suits, the court will save judicial time if all interested parties are allowed to intervene in the notice and hearing stages mandated by *Mandujano* and *Navajo Freight,* as well as at later stages. Articulating the proper standards for timely intervention, unfortunately, remains for yet another day.

Margie Valdez

VII. TITLE VII RIGHTS OF TRANSSEXUALS

A. INTRODUCTION

In *Holloway v. Arthur Anderson and Co.,*[1] the plaintiff, a transsexual[2] undergoing the medical treatment involved in gen-

1. 566 F.2d 659 (9th Cir. Dec., 1977) (per Neilson, D.J.; the other panel members were Goodwin and Anderson, JJ.).

2. "A transsexual is an individual anatomically of one sex who firmly believes he belongs to the other sex. This belief is so strong that the transsexual is obsessed with the desire to have his body, appearance, and social status conform to that of his 'rightful' gender." R. GREEN & J. MONEY, TRANSSEXUALISM AND SEX REASSIGNMENT, 487 (1969), *cited in* Comment, *Transsexualism, Sex Reassignment Surgery and the Law,* 56 CORNELL L. REV. 963 n.1 (1971). [hereinafter CORNELL Comment]. Transsexualism occurs in both males and females and thus the personal pronouns in the cited definition are not always appropriate. A transsexual is clearly distinguishable from a homosexual, who is

> clearly classifiable as to sex on all factors and consciously seeks sexual relationships with those of the same sex, while the transsexual seeks sexual relationships as a member of the "opposite sex." The transsexual also should not be confused with the transvestite, defined as one who experiences psychological relief and sexual arousal from dressing in the clothes of the opposite sex. There is now an extensive body of medical and psychological literature on transsexualism and a sizeable medical community worldwide dealing with the problem.

Comment, *The Law and Transsexualism: A Faltering Response to a Conceptual Dilemma,* 7 CONN. L. REV. 288, 292 (1975) [hereinafter CONNECTICUT Comment]. The above cited comments contain detailed discussions of transsexualism and its treatment and may be consulted for citation to the principal medical authorities.

der reassignment,[3] was dismissed by her[4] employer, who claimed her appearance and behavior were "very disruptive and embarrassing to all concerned."[5] After exhausting administrative remedies, Holloway filed a complaint alleging that she was fired for her transsexuality, in violation of Title VII.[6] The district court, holding that Title VII's prohibition of discrimination on the basis of sex did not prohibit employers from discriminating against individuals who undergo gender reassignment procedures, dismissed plaintiff's claim for lack of jurisdiction and failure to state an actionable claim.[7] The Ninth Circuit, in a two to one decision, affirmed the district court's judgment that Title VII does not embrace transsexual discrimination.[8] The *Holloway* majority also

3. The only procedure found medically successful in treating transsexualism includes sex reassignment surgery and hormone therapy. *See* medical authorities cited in G.B. v. Lacker, 80 Cal. App. 3d 64, 67-72, 145 Cal. Rptr. 555, 556-59 (1st Dist. 1978) (ordering writ of mandate directing the California Department of Health to authorize transsexual surgery under Medi-Cal program); *accord,* Doe v. State Dept. of Public Welfare, 257 N.W.2d 816, 819 (Minn. 1977). Prior to surgery, many gender identity clinics require that the patient live in the role of the opposite sex for one year. A social adjustment in the new role that is better than that in the former role is a prerequisite to consideration for surgery. Cross-dressing is usually required in this probationary period. In male-to-female transsexuals, estrogens and progresterones are administered for the suppression of existing sexual characteristics and development and maintenance of the opposite gender's phenotype. If the probationary period is successful, radical sex conversion surgery is performed, and as a result the transsexual has the external genital appearance of the transsexual's psychological sex. *See* MEHL, TRANSSEXUALISM: A PERSPECTIVE, PROCEEDINGS OF THE SECOND INTERDISCRIPLINARY SYMPOSIUM ON GENDER DYSPHORIA SYNDROME (1973).

4. The plaintiff, a male-to-female transsexual, is referred to by the feminine personal pronoun throughout the opinion. She was apparently in the pre-surgery probationary period living in the female role when terminated by her employer.

5. Plaintiff's supervisor, in an affidavit summarized in a footnote to the opinion, told of the wearing of cosmetics and women's clothing, use of the men's restroom, and behavior at social functions. 566 F.2d at 661 n.1. Although the employer claimed plaintiff's appearance and behavior were the cause for dismissal, plaintiff claimed she was dismissed due to her transsexualism. Plaintiff's appearance and behavior were generally consistent with requirements of gender clinics as a prerequisite for consideration for surgery. *See* note 3 *supra* and accompanying text. The employer's supervisor required that Holloway use the men's restroom. Affidavit of Marion Passard In Opposition to Plaintiff's Motion for Partial Summary Judgment, at 2, Holloway v. Arthur Anderson (N.D. Cal. Apr. 5, 1976).

6. Title VII of the Civil Rights Act of 1964 provides for equal opportunity in employment. It states, in pertinent part:

> (a) It shall be an unlawful employment practice for an employer
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> (1) to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex.

42 U.S.C. § 2000e-2(a)(1) (1976).

7. Holloway v. Arthur Anderson & Co. (N.D. Cal. Apr. 5, 1976).

8. 566 F.2d at 664.

held that the exclusion of transsexuals from Title VII's protections does not violate the fourteenth amendment's equal protection clause.[9]

B. Title VII Prohibition Against Sex Discrimination in Employment as Applied to Transsexuals

In the area of equal opportunity in employment, Title VII of the Civil Rights Act of 1964 is the most frequently utilized federal statute.[10] Although its major goal is to proscribe racial discrimination,[11] it also prohibits sex-based discrimination by the following provision: "It shall be an unlawful employment practice for an employer . . . to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex."[12] When enacted, no definition of the term "sex" was incorporated into the statute, and there was little pertinent debate that indicated exactly what the legislators meant that term to include.[13] It is generally assumed that the legislators were not considering transsexuals when they drafted[14] and enacted[15] Title VII's provisions against sex discrimination. Congress has not subsequently clarified the scope of Title VII's provisions affecting transsexuals.[16]

This lack of explicit congressional consideration of transsexuals has led the courts to conclude that employers may discriminate against transsexual employees without violating Title VII.[17]

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9. *Id.*

10. *See generally* Connolly & Connolly, *Equal Employment Opportunities: Case Law Overview*, 29 Mercer L. Rev. 677, 680 (1978).

11. The background of the Civil Rights Act of 1964 is sketched in [1964] U.S. Code Cong. & Ad. News at 2362-65. *See also* B. Schleli & D. Grossman, Employment Discrimination Law, vii-xiii (1976).

12. 42 U.S.C. § 2000e-2(a)(1) (1976).

13. *See* Diaz v. Pan Am. World Airways, 442 F.2d 385, 386 (5th Cir. 1971).

14. The provision proscribing sex discrimination was introduced by an opponent of the Civil Rights Act of 1964, allegedly to sabotage it. *See* Willingham v. Macon Tel. Pub. Co., 507 F.2d 1084, 1090 (5th Cir. 1975) (en banc), *vacating* 482 F.2d 535 (5th Cir. 1973). *See also* Note, *Developments in the Law—Employment Discrimination and the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109, 1167 (1971).

15. *See* Grossman v. Bernard's Township Bd. of Educ., 11 F.E.P. 1197 (D.N.J. 1975), *aff'd mem.*, 536 F.2d 319 (3d Cir. 1976), *cert. denied*, 429 U.S. 897 (1976). *Accord*, Voyles v. Ralph K. Davies Medical Center, 403 F. Supp. 456 (N.D. Cal. 1975), *aff'd* 570 F.2d 354 (9th Cir. 1978).

16. Although amendments to Title VII have been introduced in Congress to explicitly protect against "affectional or sexual preference" discrimination, these amendments do not appear to affect transsexuals. *See Voyles*, 403 F. Supp. at 457 n.2.

17. *Id.* at 457; 11 F.E.P. at 1199.

In two cases prior to *Holloway,* the discharged employees' Title VII actions were dismissed for lack of subject matter jurisdiction.[18] In both cases the courts held that until Congress specifically established transsexuals as a protected group, employers could use transsexuality as justification for adverse action.[19]

C. The Holloway Opinion

The Majority Opinion

The *Holloway* majority reasoned that when Congress enacted Title VII it only contemplated the two traditional sex categories, male and female,[20] and therefore, to state a Title VII sex discrimination claim, a plaintiff must necessarily plead that he or she was discriminated against as a male or as a female.[21] Under this construction, Holloway's claim that she was discriminated against because she was a transsexual stated no cause of action. Thus, the majority dismissed the case without deciding whether a transsexual plaintiff could change his or her sex classification for the purposes of Title VII,[22] or, for that matter, what indicia the court

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18. In Grossman v. Bernard's Township Bd. of Educ., 11 F.E.P. 1197 (D.N.J. 1975), *aff'd mem.*, 536 F.2d 319 (3d Cir.), *cert. denied*, 429 U.S. 897 (1976), the plaintiff, an elementary school teacher who had completed sex reassignment surgery, was discharged from her position. Both the EEOC and the district court held that firing an employee because of transsexual status violated neither Title VII language nor congressional intent.

In Voyles v. Ralph K. Davies Medical Center, 403 F. Supp. 456 (N.D. Cal. 1975), *aff'd*, 570 F.2d 354 (9th Cir. 1978), a hemodialysis technician was terminated when she informed her employer's personnel director that she intended to undergo radical sex conversion surgery. The district court dismissed her Title VII lawsuit stating that:

> [t]he legislative history of as well as the case law interpreting Title VII nowhere indicate that sex "discrimination was meant to embrace "transsexual" discrimination. . . . [T]he legislative history surrounding passage of Title VII reveals that Congress' paramount, if not sole, purpose in banning employment practices predicated upon an individual's sex was to prohibit conduct which, had the victim been a member of the opposite sex, would not have otherwise occurred. Situations involving transsexuals, homosexuals or bi-sexuals were simply not considered, and from this void the court is not permitted to fashion its own judicial interdictions.

Id. at 457 (footnote omitted).

19. Following *Voyles, Grossman* and *Holloway,* a transsexual was fired from a waitress position when a customer reported to plaintiff's supervisor that he had known her as a man. The court held that Title VII did not prohibit discrimination against transsexuals and dismissed plaintiff's claim for failure to state a cause of action and for absence of jurisdiction. Powell v. Read's, Inc., 436 F. Supp. 369 (D. Md. 1977).

20. 566 F.2d at 662 n.4.

21. *Id.* at 664.

22. Although the majority stated that to plead a Title VII cause of action, a transsexual must claim he (or she) was discriminated against as a male (or female), the court was

would find controlling in determining the plaintiff's sex.[23]

The plaintiff contended that a construction of Title VII, which excludes transsexuals *per se* from protection, denies transsexuals equal protection of the laws.[24] Relying on *Ashwander v. Tennessee Valley Authority*,[25] which held that, whenever possible, statutes should be judicially construed so that constitutional challenges would be avoided, Holloway argued that the court should read Title VII to include transsexuals within the "sex" classification.

The majority assumed that an equal protection issue had been raised, but after briefly considering some of the tests relevant to an equal protection analysis, concluded that there was no constitutional violation.[26] In order to determine whether an equal protection violation exists, the courts have applied three general levels of scrutiny to statutory classifications which require or permit differential treatment for separate groups of persons.[27] The traditional "rational basis" level of scrutiny results in a legislative classification being upheld so long as it is not patently arbitrary and bears a rational relationship to a legitimate government

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silent as to whether a male-to-female transsexual who had completed gender reassignment procedures would have to plead as a male or as a female. *Id.*

For one court's approach to the legal determination of the sex of a transsexual, relying on expert medical testimony, see Richards v. United States Lawn Tennis Assoc., 400 N.Y.S.2d 267 (Sup. Ct.) (1977). The court concluded that "the overwhelming medical evidence [is] that this person is now female," and the court enjoined a women's tennis tournament from excluding from competition a former male tennis player. *Id.* at 272. *See also* Comment, *Transsexuals in Search of Legal Acceptance: The Constitutionality of the Chromosome Test*, 15 SAN DIEGO L. REV. 531 (1978). In M.T. v. J.T., 140 N.J. Super. 77, 355 A.2d 204 (Super Ct. App. Div. 1976), the court held that plaintiff, a male-to-female transsexual who sought support and maintenance from her separated husband, was indeed a female "at least for purposes of marriage." *Id.* at 211. The court did not suggest for what other "purposes" its determination of sex would not apply.

23. Some individuals possess anatomical characteristics of both sexes (hermaphrodites). Others have chromosome anomalies (Klinefelter's syndrome). When the majority restricted the meaning of the term "sex" in Title VII to the statistically normal categories it left open the question of whether individuals not readily classifiable can state any Title VII sex discrimination cause of action.

24. The fourteenth amendment provides, in part: "Nor shall any state . . . deny to any person within its jurisdiction the equal protection of the laws." The fourteenth amendment guarantees have been applied to the federal government through the Fifth Amendment Due Process Clause. *See* Bolling v. Sharp, 347 U.S. 497, 499 (1954).

25. 297 U.S. 288, 347 (1936).

26. 566 F.2d at 663-64.

27. The three levels of scrutiny applied in equal protection analysis are sometimes categorized as the rational basis test, the strict scrutiny test, and the intermediate or heightened scrutiny test. *See* notes 28-32 *infra* and accompanying text.

interest.[28] If the statute discriminates against a "suspect"[29] class, or burdens a "fundamental right,"[30] the court will strictly scrutinize the statute and invalidate it unless a compelling state interest is served.[31] When either important, but not "fundamental," interests are burdened, or when sensitive, but not necessarily "suspect," classes are established, recent Supreme Court opinions have applied a heightened, but not "strict," judicial scrutiny.[32]

The *Holloway* majority concluded that transsexuals did not constitute a suspect classification and, therefore, strict scrutiny was not an appropriate test in this case.[33] The opinion made no mention of applying an intermediate level of scrutiny to the construction of the statute.[34] In applying the rational basis test, the majority misstated the proposition it was examining in a manner which eliminated the classification which it was purportedly con-

28. *See* McGowan v. Maryland, 366 U.S. 420, 425-26 (1961). Under the rational basis test, great deference is given by the court to legislative classifications, which are set aside as violative of equal protection only when the distinctions drawn bear no rational relationship to a legitimate state end. *See* McDonald v. Bd. of Election, 349 U.S. 802 (1969); Williamson v. Lee Optical, 348 U.S. 483, 487 (1955).

29. Race and national origin are the classic suspect categories. Statutes or administrative practices invidiously discriminating against these groups are presumptively invalid. Loving v. Virginia, 388 U.S. 1, 10 (1967); Yick Wo v. Hopkins, 118 U.S. 356, 362 (1886); Strauder v. West Virginia, 100 U.S. 303, 305-06 (1880).

30. To be a fundamental right, that right need not be explicitly mentioned in the Constitution. Sharpiro v. Thompson, 394 U.S. 618, 629-30 (1969) (right to travel from one state to another is fundamental). *See also* Skinner v. Oklahoma, 316 U.S. 535, 541 (1942). ("Strict scrutiny of the classification which a State makes in a sterilization law is essential, lest unwittingly, or otherwise, invidious discriminations are made.")

31. In general, strict scrutiny is fatal, and the statute is struck down. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW, 1000-01 (1978) [hereinafter, TRIBE]. The paradigm exception was Korematsu v. United States, 323 U.S. 214, 323 (1944). (In wartime, military authorities may restrict civil rights of a single racial group although most in group are loyal citizens.)

32. The Supreme Court has subjected gender-based classifications, among others, to an intermediate level of scrutiny under the equal protection clause. *See The Supreme Court, 1974 Term*, 89 HARV. L. REV. 96 n.1. *See also* Craig v. Boren, 429 U.S. 190 (1976). In *Craig* Justice Powell noted "[c]andor compels the recognition that the relatively deferential 'rational basis' standard of review normally applied takes on a sharper focus when we address a gender-based classification." *Id.* at 210-11 n.* (Powell, J., concurring).

33. 566 F.2d at 663.

34. Since the intermediate level of scrutiny is a prominent technique for examining gender-based classifications, *see* note 32 *supra* and accompanying text, it is surprising the *Holloway* court did not use it. For a summary of the review techniques encompassed in the intermediate level of equal protection scrutiny, *see* TRIBE, *supra* note 31 at 1082-89. *See also* Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection*, 86 HARV. L. REV. 1, 20-37 (1972).

sidering. Instead of analyzing whether a prohibition of discrimination between males and females *which excluded from protection transsexuals undergoing gender reassignment* was rationally related to a legitimate government interest,[35] the majority erroneously phrased the proposition: "[i]t can be said without question that the prohibition of employment discrimination between males and females . . . is rationally related to a legitimate government interest.[36]

The Holloway Dissent

The dissent, although agreeing with the majority that Congress had not specifically contemplated the direct application of Title VII to transsexuals, found in the language of the statute a derivative protection for transsexuals.[37] The dissent suggested that the firing of a transsexual who had completed her gender transformation treatment and attained a new sexual classification would be a discharge based on sex, forbidden by Title VII.[38] Since post-treatment discharge was one based on sex, a discharge during the plaintiff's transition period, having the same motive and result, should receive the same protection.[39] Thus, finding a Title VII cause of action for transsexuals,[40] the dissent stated that it would vacate the district court's dismissal and permit the plaintiff to replead that she was discharged for becoming a female.[41]

C. The Scope of the Term "Sex" in Title VII

The majority opinion concluded that Title VII would not protect transsexuals until Congress expanded the scope of the sex

35. The court offered no suggestion how such a regulation, applying unequally to employees depending on gender-related characteristics, would rationally serve Title VII's objectives.

36. 566 F.2d at 663-64.

37. *Id.* at 664.

38. *Id.* Grossman v. Bernard's Township Bd. of Educ., 11 F.E.P. 1197 (D.N.J. 1975), *aff'd mem.*, 536 F.2d 319 (3d Cir. 1976), *cert. denied*, 429 U.S. 897 (1976), the court reached the opposite result: the plaintiff had already completed her sex reassignment operation before she was terminated. Both the Equal Employment Opportunity Commission and the district court found no Title VII cause of action. The district court explicitly assumed the plaintiff had become "a member of the female gender." 11 F.E.P. Cases at 1198 (1975). For the EEOC opinion, see 12 F.E.P. Cases 1355 (1974).

39. The dissent, unlike the majority, concluded that one need not be born into a Title VII protected class to obtain relief under the statute. 566 F.2d at 664.

40. The dissent's argument avoided claiming Title VII rights for transsexuals *per se*. The protection was derived from plaintiff's post-surgery status as a male or a female.

41. After finding a Title VII cause of action, the dissent noted that the equal protection claim did not have to be considered. 566 F.2d at 665.

discrimination clause. However, neither the terms of the statute[42] nor the legislative history[43] required that the court read the statute so narrowly that it excluded transsexuals. When confronted with remedial statutes having limited legislative histories, courts have sometimes assumed broad latitude to implement the purpose of the legislation.[44] The *Holloway* court could have concluded that Title VII's provisions against sex discrimination reflected Congress' intent to allocate job opportunities equally, without regard to stereotypical sexual characteristics.[45]

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42. The statute did not contain a narrow definition of the term "sex." Although the majority apparently felt the "plain meaning" of the term "sex" was provided by the defendant, who cited the first definition of "sex" in WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY (1970), had they consulted WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED (1976) at 2081, they would have found under "sex" a cross reference to "hermaphrodites," indicating the definition of "sex" included more than merely two bipolar categories.

43. Although the legislative history of the 1972 amendments relied on by the majority evidenced concern for women workers, the legislative history also indicated approval of a more broadly stated principle of equality, *citing* Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385 (5th Cir. 1971) (males entitled to equal opportunity to obtain airline jobs formerly restricted to females), [1972] U.S. CODE CONG. & AD. NEWS at 2141.

Both the EEOC and a district court have held, however, that Title VII does not protect homosexuals or effeminate males from employment discrimination. EEOC Decision No. 76-67, March 2, 1976, and EEOC Decision No. 76-65, March 2, 1976, 2 Empl. Prac. Guide (CCH), Smith v. Liberty Mutual Ins. Co., 395 F. Supp. 1098, 1101 (N.D. Ga. 1975), *aff'd* 569 F.2d 325 (1978). The EEOC view is that in enacting Title VII Congress intended to outlaw discrimination based on gender, an immutable characteristic, not sexual practices or proclivities. *See* EEOC Decision No. 876-75, Empl. Prac. Guide (CCH) at 4266. For a viewpoint suggesting that homosexuals satisfy the criteria of "suspectness" because the trait is almost immutable, *see* TRIBE, *supra* note 31, at 944-45 n.17. A comparison of the rights of homosexual public employees under Civil Service regulations and private employees under Title VII provisions is found in Siniscalco, *Homosexual Discrimination in Employment*, 16 SANTA CLARA L. REV. 495 (1976). Recent unsuccessful attempts to amend Title VII to benefit homosexuals are noted in *Holloway*. 566 F.2d at 662 n.6.

44. *The Supreme Court, 1974 Term*, HARV. L. REV. 1, 100 n.38 (1975). For example, after noting Title VII's meagre legislative history regarding sex discrimination, a Fifth Circuit panel stated:

> The purpose of the act was to provide a foundation in the law for the principle of nondiscrimination. Construing the statute as embodying such a principle is based on the assumption that Congress sought a formula that would not only achieve the optimum use of our labor resources but, and more importantly, would enable individuals to develop as individuals.

Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 386-87 (5th Cir. 1971).

45. One Justice has stated: "By adding the prohibition against job discrimination based on sex to the 1964 Civil Rights Act Congress intended to prevent employers from refusing 'to hire an individual based on stereotyped characterizations of the sexes.' " Phillips v. Martin Marietta Corp., 400 U.S. 542, 545 (1971) (Marshall, J. concurring) (footnotes and citations omitted).

For a view contra, *see* Comment, *Sex Discrimination in Employment: An Attempt to Interpret Title VII of the Civil Rights Act of 1964*, 1968 DUKE L.J. 671, 692.

The court adopted a simple bipolar conception of sex which recognized only two legitimate categories, male and female. Although this conception corresponds with prior Title VII transsexual cases,[46] it provides an inadequate analytical framework for deciding sex discrimination or equal protection cases. Expert medical opinions agree that sexual classification is not unidimensionally determined[47] and that individuals do not always unambiguously classify into a bipolar scheme. Thus, the Ninth Circuit's view that Title VII prohibits discrimination only against males or females apparently fails to protect those anomalous individuals who have contradictory sexual characteristics.[48]

The dissent was correct in noting the irrationality of an interpretation which would protect a transsexual who had completed gender reassignment procedures, but would offer no protection whatever until the extensive procedure was completed.[49] The majority failed to indicate which of the various sexual classification indicia it would find controlling in assigning an individual to a sexual classification, and left unanswered whether one's sexual status is immutable. Because transsexuals' gender status may also be at issue in other simultaneous non-Title VII proceedings,[50]

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46. *See* note 15 *supra* and accompanying text.

47. The CORNELL Comment, *supra* note 2, tabulates the significant determinants as follows:

1. sex chromosome constitution;
2. gonadal sex;
3. sex hormone pattern;
4. internal sex organs other than the gonads;
5. genitalia;
6. secondary sex characteristics;
7. sex of rearing (usually the sex assigned at birth); and
8. assumed sex role, or psychological sex.

Id. at 965.

48. *Id. See id.* at n.5 *citing* J. MONEY, SEX ERRORS OF THE BODY, and text accompanying for an example of "ambiguity of the sexual organs that makes it difficult for doctors to determine even genital sex." For a discussion of gender ambiguity resulting from a mistaken sex of rearing due to sex being misassigned at birth, *see* In the Matter of Anonymous, 57 Misc. 2d 813, 815-16 (Civ. Ct. 1968).

49. In Doe v. State Dept. of Public Welfare, 257 N.W.2d 816, 817 (Minn. 1977), a transsexual underwent at least a nine year period of clinical hormonal treatment, testing and evaluation, and crossdressing before surgery was authorized. The *Holloway* majority did not contend that after the sex reassignment procedures were completed that transsexuals would benefit from Title VII. But, so long as male and female transsexuals faced equal discrimination, the majority saw no Title VII violation. 566 F.2d at 663.

50. Non-Title VII proceedings might include: petitioning to change a birth certificate and other civil records; dissolution of marriage or contracting of marriage; probate problems ("the land and farm machinery to my sons; the household furnishings and goods to my daughters," CONNECTICUT Comment, supra note 2, at 327); defending a criminal prosecution for cross-dressing; defending a criminal prosecution charging homosexual practices;

an oversimplistic definition of the term "sex" by a court dealing with a Title VII claim may result in a plaintiff being assigned to conflicting sexual classifications.

Since Congress mandated no specific definition of the term "sex" the court could have broadly construed the protection of the term to include those whose genders were ambiguous or not readily classifiable.[51] Those employees claiming to have incurred Title VII sex discrimination could then offer evidence that their alleged disparate treatment was based on their sex.[52] Employers would retain the statutory defense of bona fide occupational qualifications[53] and the judicially created "business necessity" defense.[54]

Equal Protection Strict Scrutiny: Suspect Classification

The *Holloway* majority failed to properly apply equal protection analysis when they concluded that no constitutional violation resulted from excluding transsexuals *per se* from Title VII protection. Transsexuals bear many of the characteristics enumerated as indicia of "suspect classifications" in recent Supreme Court opinions. The following indicia have been used to distinguish suspect classifications from non suspect legislative distinctions: (1) the "characteristic . . . bears no relation to ability to perform or contribute to society;"[55] (2) the classifier "is an immutable characteristic determined solely by the accident of birth . . . [and in use] would seem to violate 'the basic concept of our

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or, obtaining an injunction against a sports organization to obtain admission to competition limited to one gender.

51. The "Definitions" section of Title VII contained no definition of the term "sex." *See* note 42 *supra* and accompany text.

52. Under this interpretation of Title VII homosexuals would not be protected, since they form a classification based on behavioral preferences rather gender status, according to the weight of medical testimony. Some commentators state, *contra,* that homosexuality, like transsexuality, is determined at birth or an early age, and is almost as immutable. See TRIBE supra note 31 at 944-45 & n.17. For analysis of employment rights of homosexuals, see note 43 *supra* and accompanying text. *See also* 7 GOLDEN GATE U.L. REV. 99-113 (1977).

53. The statute permits sex discrimination "in those certain instances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . ." 42 U.S.C. § 2000e-2(e)(1). *See* Sirota, *Sex Discrimination: Title VII and the Bona Fide Occupational Qualification,* 55 TEXAS L. REV. 1025 (1977), and cases cited in B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 278-93 (1976).

54. The leading case treating business necessity is Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (Nothing in Title VII prohibits the discharge of an employee for good cause).

55. *See* Frontiero v. Richardson, 411 U.S. 677, 686. (1973).

system that legal burdens should bear some relationship to individual responsibility;' "[56] (3) "the class is . . . saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritiarian political process;"[57] and (4) there is "prejudice against discrete and insular minorities . . . which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."[58] As will be shown, transsexuals possess each of these indicia.

First, there is no inherent reason why an employee's transsexual status impairs his or her ability to efficiently perform the duties required by an employer; in fact, research indicates otherwise.[59] Therefore, a policy permitting employers to arbitrarily terminate a transsexual whose performance is satisfactory[60] is unwarranted.

Second, the *Holloway* majority failed to note that medical specialists almost unanimously agree that transsexualism is determined at birth or at a very early age,[61] and is an irreversible condition,[62] closely resembling immutable characteristics previously held to be suspect. Although the court was correct in stating that there are differing medical theories as to the etiology of transsexualism, courts which have considered expert opinion generally have concluded that the condition is immutable and sex transformation surgery is the only successful treatment.[63] Even if

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56. *Id.*

57. San Antonio School District v. Rodriguez, 411 U.S. 1, 28 (1973).

58. United States v. Carolene Products Co., 304 U.S. 144, 152-53 & n.4 (1937).

59. The postoperative results from three separate studies are in accord. *See* CONNECTICUT Comment, *supra* note 2, at 976-77.

60. Holloway had received a promotion and a pay raise in the year she was terminated. 566 F.2d at 661.

61. One commentator states that "gender reversal in both sexes is present as soon as any behavior that can be called masculinity or feminity begins, even as early as 1 year of age." STOLLER, GENDER IDENTITY II COMPREHENSIVE TEXTBOOK OF PSYCHIATRY, 1403 (1975). *Accord*, CORNELL Comment, *supra* note 2, at 963 n.1.

62. It has been noted that "medical science has not found any organic cause or cure (other than sex reassignment surgery and hormone therapy) for transsexualism . . . nor has psychotherapy been successful in altering the transsexual's identification with the other sex or his desire for surgical change." Pauley, *The Current Status of the Change of Sex Operation*, 147 NERVOUS AND MENTAL DISEASE 462, 463 (1968), *cited* in CORNELL Comment, *supra* note 2 at 963 n.1. The courts agree. *See* Doe v. State Dept. of Public Welfare, 257 N.W.2d 816, 819 (Minn. 1977); Richards v. United States Lawn Tennis Assoc., 400 N.Y.S.2d 267, 270-71 (Sup. Ct. 1977).

63. *See* note 62 *supra* and accompanying text.

it could be concluded that transsexualism is not an immutable characteristic, the Supreme Court, in *Graham v. Richardson,*[64] made it clear that in order to be suspect, a classification need not necessarily be immutable.[65]

Finally, transsexuals clearly are a "discrete and insular minority" who are relatively powerless to protect their interests in the political process. Estimates of the number of transsexuals in the United States range from 2,000 to 10,000.[66] Unlike racial and ethnic minorities and women, they do not have substantial legal and political support groups.[67] When the courts interpret Title VII as permitting employers the right to discriminate against employees or job applicants for their transsexualism, this obviously deters transsexuals from organizing politically to campaign for equal employment opportunities for fear their status will be discovered.

Transsexuals constitute a small, relatively powerless group, with characteristics similar to other classifications deemed suspect, and thus, transsexuals would appear to comprise a suspect class. Since no compelling governmental justification has been offered to support an interpretation of Title VII which invidiously disadvantages transsexuals as compared with those whose gender make-up is more conventional, it would have been proper for the majority to have found an equal protection violation.

Equal Protection Strict Scrutiny: Fundamental Rights

The *Holloway* majority's inquiry into whether an equal protection violation could result from transsexuals *per se*[68] being ex-

64. 403 U.S. 365 (1971).

65. *Id.* (established aliens as a suspect classification).

66. *See* MATTO, THE TRANSSEXUAL IN SOCIETY, CRIMINOLOGY 85, 89 (May, 1972).

67. Although homosexuals, like transsexuals, have not been protected under Title VII by the EEOC or the courts, they have had sufficient political strength to obtain equal employment opportunity ordinances in several cities, and have obtained the introduction, although not the enactment, of beneficial legislation in the Congress. *See* note 16 *supra* and accompanying text.

68. The majority position that as long as male transsexuals and female transsexuals were equally burdened, no equal protection violation would occur raises the issue whether the symmetry of the burden mitigates the possible invidiousness of its application. *See* Loving v. Virginia, 388 U.S. 1 (1967). The *Loving* court stated:

> Because we reject the notion that the mere "equal application" of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations, we do not accept the State's contention that these statutes should be upheld if there

cluded from Title VII was incomplete, because it omitted consideration of whether the classification scheme burdened a "fundamental right." Under the fundamental rights equal protection test, strict judicial scrutiny is required whenever a legislative classification impinges on a right deemed fundamental, and unless the distinction serves a compelling state interest, the classification is held unconstitutional. Rights the courts have deemed fundamental have been categorized by one commentator into two types: first, those rights such as the right to travel which are "independently protected against government interference" or "implicit in the Constitution;" and second, those rights necessary for the exercise of intimate personal choices.[69] It is this second branch of fundamental rights analysis which the court should have applied in *Holloway*.

The right to obtain a coherent sexual identity appears to be one of those rights so fundamental that it should be out of the reach of majoritarian restraint. One commentator has recently argued that one's sexual identity is even more important than one's racial identity in our society.[70] The need to establish a coherent sexual identity is paramount for transsexuals, whose unique problem is that their psychological sex does not correspond with their anatomical characteristics.[71] The ability of these individuals to overcome this severe disability depends almost entirely on their undergoing gender reassignment treatment.[72]

Other rights found to be fundamental have established constituional limits to governmental intrusion into private matters. The right-to-privacy case law establishes both a right to make private decisions in intimate matters,[73] and a right to be free of

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> is any possible basis for concluding that they serve a rational purpose.

Id. at 8.

69. *See* TRIBE, *supra* note 31 at 1002-03 (1978).

70. Wasserstrom, *Racism, Sexism, and Preferential Treatment: An Approach to the Topics*, 24 U.C.L.A. L. REV. 581, 587 (1977).

71. *See* note 2 *supra* and accompanying text.

72. *See* note 3 *supra* and accompanying text. The extreme need of transsexuals to establish a coherent identity through medical treatment is illustrated by the fact when medical procedures are unavailable to transsexuals, acts of self mutilation or suicide may result. *See* authorities cited in G.B. v. Lackner, 80 Cal. App. 3d at 67, 69, & 80, 145 Cal. Rptr. at 556-57, 564 (1st Dist. 1978).

73. *See* Griswold v. Connecticut, 381 U.S. 479, 485 (1965) ("The zone of privacy created by several fundamental constitutional guarantees" extends to marital choices regarding procreation.) *See also* Eisenstadt v. Baird, 405 U.S. 438 (1972) (reproductive autonomy of Griswold explicitly extended to individuals, unmarried or married).

invidious discrimination and majoritarian domination.[74] An attempt has been made to apply the principle that "every individual has a right to be free from unwarranted governmental intrusions into one's decisions on private matters of intimate concern"[75] in a case where homosexual plaintiffs sought a declaration of invalidity of Virginia's anti-sodomy criminal statute.[76] In *Doe v. Commonwealth's Attorney,* although the district court majority declined to extend the right of privacy established in *Griswold v. Connecticut*[77] to shield homosexuals from prosecution for violation of the sodomy law,[78] the dissent contended the right of privacy reached beyond the marital situation of *Griswold* to broadly guarantee as fundamental "intimate personal decisions of substantial importance to the individuals involved."[79] The *Doe* dissent felt this right of privacy could be restrained only by a showing of a compelling state interest.

The *Doe* minority's rationale would certainly include transsexuals, who seek not the right to engage in sexual relations with partners of their own sex, but rather the right to establish their personal gender identity with medical assistance. The medical procedures are not criminally sanctioned,[80] unlike the homosexual activity of the *Doe* plaintiffs, and there appear to be no compelling state interest to justify burdening this class. For those courts who hold the constitutional zone of privacy extends beyond the marital and familial sphere, an interpretation of Title VII substantially burdening transsexuals undergoing gender reassignment should trigger a strict scrutiny equal protection analysis.

D. Conclusion

The Ninth Circuit will probably again face the issue of the possible Title VII rights of transsexuals. It is hoped that the court will undertake a more comprehensive analysis of the equal protection and statutory construction problems likely to be raised. Should the court reject the claims of transsexuals for Title VII protection, this minority's relative powerlessness will probably

74. Skinner v. Oklahoma, 316 U.S. 535 (1942) (Striking down compulsory sterilization for persons committing some categories of felonies).

75. Doe v. Commonwealth's Attorney, 403 F. Supp. 1199, 1203 (E.D.Va. 1975), *aff'd mem.*, 425 U.S. 901 (1976).

76. *Id.*

77. 381 U.S. 479 (1965).

78. Doe v. Commonwealth's Attorney, 403 F. Supp. at 1203.

79. *Id.* at 1204.

80. Connecticut Comment, *supra* note 2, at 294-95.

preclude its obtaining sufficient congressional support to amend Title VII, and transsexuals will continue to be subject to unequal employment opportunities regardless of their ability to perform their duties satisfactorily.

Robert Hoerger

VIII. PREGNANCY DISABILITY AND SEX DISCRIMINATION

A. INTRODUCTION

During the past term the Ninth Circuit held that an employer had no duty to assign a pregnant employee to a less strenuous job during her pregnancy. The plaintiff in *Roller v. City of San Mateo,*[1] a policewoman, claimed that the city's refusal to assign her requested light duty instead of placing her on sick leave was sex discrimination which violated Title VII and unconstitutionally denied her due process rights by burdening her decision to bear a child.[2] The city doctor, after examining the plaintiff, concluded she was pregnant and in good health, capable of performing "light duties" for most of the remaining five or six months of her pregnancy, but incapable of performing full emergency duties. The doctor recommended her removal from the payroll and assignment to sick leave after a city administrator informed him city policy required that all officers be capable of full performance at all times, unless the city manager approved a "light duty" assignment to an appropriate project.[3]

The Ninth Circuit held that where there is an employment policy discouraging "light duty" assignments for employees temporarily disabled from performing their regular duties, a pregnant employee's Title VII rights are not violated unless she can prove the policy is discriminatorily applied.[4] The court also held that the due process right established in *Cleveland Board of Education v. LaFleur*[5] imposes no duty on an employer to provide an alternative job for a pregnant employee who requests one but merely requires that an employee's removal from the payroll be based on an individualized determination of fitness rather than

1. 572 F.2d 1311 (9th Cir. Dec., 1977). (per Merrill, J.; the other panel members were Wright, J. and Jameson, D.J.).

2. *Id.* at 1311-12.

3. *Id.* at 1312.

4. *Id.* at 1315.

5. 414 U.S. 632 (1974).

a conclusive presumption that at a specified stage of pregnancy the employee can no longer fulfill her responsibilities.[6]

B. Pregnancy Discrimination and Sex Discrimination

The path of the law determining whether employment practices related to pregnancy constitute illegal sex discrimination has followed a meandering course.[7] Title VII[8] provides that discrimination based on sex is an unlawful employment practice but the lack of an illuminating legislative history[9] or explicit textual provisions dealing with pregnancy has permitted an ambulatory definition of sex discrimination. Plaintiff's have generally established Title VII discrimination by arguing that they, as a class, were disparately treated by their employer; however, in some cases, plaintiffs have prevailed by showing that while the employer's policy was neutral on its face, it created a disparate impact on plaintiff's class and was not justified by business necessity.[10] Since the condition of pregnancy is biologically limited to women, policies singling out pregnant employees necessarily treat some women differently than men. This section briefly sketches what the pre-*Roller* courts have found to be evidence of sex discrimination sufficient to prove that an unlawful employment practice was committed.

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6. 572 F.2d at 1316. In addition, the court corrected the district court's erroneous alternative holding that it only need review plaintiff's administrative hearing. The Ninth Circuit held that under Chandler v. Roudebush, 425 U.S. 840 (1976), both private and government employees in Title VII cases were entitled to de novo trials. Because the plaintiff had been granted trial de novo by the district court, the holding below was not reversible error.

7. *See* Nashville Gas Co. v. Satty, 434 U.S. 136, 148 (1977) (Powell, J. concurring). For a survey of the case law regarding pregnancy discrimination *see* Barkett, *Pregnancy Discrimination—Purpose, Effect, and Nashville Gas Co. v. Satty*, 16 J. Fam. L. 401, 406-480 (1978) [hereinafter Barkett].

8. 42 U.S.C. § 2000e-2(1976). Relevant provisions of Section 703(a) provide:

> It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2 (1976).

9. *See* Note, *Developments in the Law—Employment Discrimination and Title VII the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109, 1167 (1971).

10. *See* B. Schleli & P. Grossman, Employment Discrimination Law, 320, 333 (1976) [hereinafter Schleli].

Pregnancy has a substantial impact on the earnings of women in the labor force.[11] Consequently two important legal issues are 1) employees' rights to benefits while disabled and off work and 2) the employees' rights to impose a mandatory pregnancy and maternity leave on an employee.[12]

The Supreme Court has held that a disability insurance system excluding pregnancy from coverage violates neither the equal protection clause[13] nor Title VII's prohibition against sex discrimination.[14] The Court first held that pregnancy discrimination was not gender discrimination in *Geduldig v. Aiello,*[15] *Geduldig* involved California's disability insurance system which paid benefits to privately employed persons temporarily unable to work. Virtually all causes of disability were covered except disabilities due to normal pregnancy.[16] The state argued that it could not include coverage of pregnancies and still maintain a self-supporting broad disability insurance program.[17] The majority opinion held that limiting benefits to disabilities other than pregnancy did not constitute invidious discrimination, since only specified disabilities and not groups of persons were eliminated.[18] Since the state has a legitimate interest in maintaining a self-supporting program based on moderate contributions, the Court held that the equal protection clause was not violated.[19]

The *Geduldig* majority, in a footnote,[20] asserted that there was a "lack of identity between the excluded disability and gender as such [since t]he program divide[d] potential recipients into two groups—pregnant women and non-pregnant persons. While the first group [was] exclusively female, the second includes members of both sexes."[21] The majority suggested two

11. *See* Barkett, *supra* note 7, at 402-06. *See also* Note, *Income Protection for Pregnant Workers*, 26 DRAKE L. REV. 389, 389-90 (1977).

12. *See* SCHLEI, *supra* note 10 at 320. A third issue arises in determining what right an employee has to take voluntary pregnancy leave. For a discussion of the employee's perspective on these problems see *id.* at 319; the employers' concerns are discussed in Barkett *supra* note 7, at 403 nn.5 & 6.

13. Geduldig v. Aiello, 417 U.S. 484, 497 (1974). Both *Geduldig* and General Electric Co. v. Gilbert, 429 U.S. 125 (1976) were recently mooted when Congress amended Title VII's definition of sex discrimination. *See* note 67 *infra* for the text of the amendment.

14. General Electric Co. v. Gilbert, 429 U.S. 125, 145-46 (1976).

15. 417 U.S. 484, 494 (1974).

16. *Id.* at 489.

17. *Id.* at 493.

18. *Id.* at 494.

19. *Id.* at 495.

20. *Id.* at 496 n.20.

21. *Id.*

possible situations which might constitute sex discrimination violative of equal protection: (1) if "distinctions involving pregnancy were a mere pretext designed to effect an invidious discrimination against the members of one sex or another,"[22] and (2) if the "selection of risks insured by the program worked to discriminate against any definable group or class in terms of the aggregate risk protection derived by that group or class from the program."[23]

Justice Brennan's dissent pointed out that a program which covered all disabilities relating to males but which singled out for elimination the most predominant disability affecting females "inevitably constitute[d] sex discrimination."[24] Having identified the employer's practice as sex discrimination, Brennan felt it could not be approved since it did not serve sufficiently important interests or utilize sufficiently narrow means to pass scrutiny.[25]

In *General Electric Co. v. Gilbert*[26] the Supreme Court was presented with a Title VII challenge to a privately sponsored disability program almost identical in coverage to California's program in *Geduldig*.[27] The disability plan was attacked as being sex discrimination violative of Title VII.[28] The majority adopted the analysis of discrimination established in *Geduldig's* footnote twenty and held that discrimination on the basis of pregnancy did not *per se* discriminate on the basis of sex.[29] After noting that a Title VII violation might be established if it were proven that the effect was discriminatory against members of one protected class,

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22. *Id.*

23. *Id.* at 496. In *Gilbert*, evidence was introduced indicating women's claim rate and claim cost (with no pregnancy coverage) was already greater than for men. *Id.* at 497 n.21.

24. *Id.* at 501.

25. *Id.* at 498. Justice Brennan argued that since the benefits plan

> "single[d] out for less favorable treatment a gender-linked disability peculiar to women, the state . . . created a double standard for disability compensation: a limitation is imposed upon the disabilities for which women workers may recover, while men receive full compensation for all disabilities suffered, including those that affect only or primarily their sex, such as prostatectomies, circumcision, hemophilia, and gout.

Id. at 501. Brennan felt that the Court's prior sex discrimination holdings mandated that for such a legislative classification to be sustained, the state must show it serves "overriding or compelling interests that cannot be achieved by a more carefully tailored legislative classification or by the use of feasible, less drastic means." *Id.* at 503.

26. 429 U.S. 125 (1976).

27. *Id.* at 132.

28. The court focused on the standard established in § 703(a)(1). *See* note 8 *supra* for the text of this subsection.

29. 429 U.S. at 135.

the majority concluded that no showing of such discriminatory effect had been made.[30]

The majority opinion emphasized that although pregnancy was a disabling condition experienced only by women, since it was substantially different from all other disabilities, its dissimilar treatment did not amount to a subterfuge discriminatorily denying women employment benefits.[31]

In holding that Title VII did not prevent differentiating pregnant disabled employees from non-pregnant disabled employees for the purpose of disability benefits, the court declined to follow EEOC guidelines established in 1972 which provided that disabilities caused by pregnancy should be treated like any other temporary disability.[32] The court also rejected the holdings of six courts of appeals[33] that had found pregnancy discrimination to be sex discrimination under Title VII.

In *Nashville Gas Co. v. Satty,*[34] prior to the Ninth Circuit's decision in *Roller,* the Supreme Court decided another Title VII pregnancy case. In *Satty* the petitioner was an employee who, after becoming pregnant, was required to take a leave of absence. During this leave she was not permitted to use accumulated sick leave even though other disabled but non-pregnant employees were entitled to use sick leave. Defendant's policy was also to prohibit pregnant employees from accumulating seniority used in bidding for new jobs upon return to work.[35] The majority held that the latter policy of treating pregnancy different than disease or disability was not on its face sex discrimination.[36] Nevertheless the court held that because the policy had the discriminatory *effect* of reducing pregnant women's future employment opportunities it violated section 703(a)(2) of Title VII.[37] The Court emphasized that Title VII requires that a distinction be made between an employer's practice which "refuse[s] to extend to

30. *Id.* at 137-40. To measure disparate effect, the court looked at the aggregate monetary value of benefits paid to men and to women. *Id.* at 138.

31. *Id.* at 136.

32. *Id.* at 140-46.

33. *Id.* at 147 (dissent).

34. 434 U.S. 136 (1977).

35. *Id.* at 137. Seniority for purposes of pension and vacation entitlement were not voided by the employer.

36. *Id.* at 140. The majority opinion relied on *Gilbert's* holding that although "[p]regnancy is, of course, confined to women . . . it is in other ways significantly different from the typical covered disease or disability." *Id. citing* Gilbert, 429 U.S. at 136.

37. *Id.* at 139-41. Seven Justices joined in this part of the opinion.

women a benefit that men cannot and do not receive . . . [and a practice which] impose[s] on women a substantial burden which men need not suffer."[38]

The employer's policy of denying employees sick leave compensation while they were on pregnancy leave was identical to the practice sustained in *Gilbert*[39] and thus, the *Satty* majority found no prima facie violation of Title VII. However, the Court observed that a facially neutral plan involving distinctions due to pregnancy might be struck down if it was merely a pretext for invidiously discriminating against females, and therefore, it remanded this issue to the district court to consider whether the plaintiff had preserved the right to further litigate the sick-leave compensation plan.[40]

C. The Roller Opinion

The *Roller* court faced two major issues:[41] (1) whether the employer's failure to grant the plaintiff modified light duty when her pregnancy rendered her incapable of performing full police duties constituted sex discrimination in violation of Title VII, and (2) whether the employer's requirement that the plaintiff take mandatory leave when less onerous duties were available constituted a violation of her due process rights.

Title VII Claim

The court used the standards enunciated in *McDonnell Douglas Corp. v. Green*[42] as an analytical framework for judging Roller's claim of sex discrimination. *Green* stated that when the plaintiff makes out a prima facie case of discrimination the burden then shifts to the employer to establish that a legitimate business policy justifies his disparate treatment.[43] If the defen-

38. *Id.* at 142. The court gave weight to 1972 Equal Employment Opportunity Commission Guidelines which called for seniority policy regarding disability due to pregnancy to be the same as policy for other temporary disabilities. *Id.* at n.4 *citing* 29 CFR § 1604.10(b) (1976).

39. *Id.* at 143.

40. *Id.* at 145-46. Three Justices, concurring in part, concluded that since the *Satty* district court trial preceded the Supreme Court's *Gilbert* decision, the plaintiff should not on remand be limited to the facts determined below before the *Gilbert* test was established. *Id.* at 147-53.

41. 572 F.2d at 1316.

42. 411 U.S. 792 (1973). The Title VII burden of proof standards *McDonnell Douglas* established for race discrimination apply in sex discrimination cases. Holthaus v. Compton & Sons, Inc., 514 F.2d 651, 652-53 (8th Cir. 1975).

43. 411 U.S. at 802.

dant satisfies this burden, the employee is still given the opportunity to show that defendant's facially neutral business policy is merely a pretext or that it is discriminatorily applied.[44]

The *Roller* court assumed, for the purposes of analysis, that the plaintiff had made a prima facie case of sex discrimination.[45] The plaintiff had presented evidence of (1) prior instances in which the employer had granted light duty to male police officers, and (2) evidence that the city doctor was willing to certify her as capable of light duty, until he was informed of the city manager's desire to centralize such decisions and the manager's recent policy disfavoring light duty assignments. The court held that, even assuming a prima facie case was established, the city manager's directive disapproving of all limited duty assignments except those on projects[46] which he specifically approved was a legitimate justification for the denial of light duty to Roller. Both the directive and the city manager's affidavit emphasized economic justifications for the policy. Similar cost considerations in *Geduldig*[47] and *Gilbert*[48] had also rebutted claims of discrimination even though the application was directed specifically against pregnant employees. Since San Mateo's policy denied the benefit to all temporarily disabled employees, it was legitimate on its face.

Having concluded the city's justification was prima facie legitimate, the court concluded that the scope of plaintiff's challenge would be limited to the issue of the fairness of its application.[49] The court also restricted its focus to events subsequent to

44. *Id.* at 802-05.

45. 572 F.2d at 1313. The court relying on *Satty* and *Holthaus* summarized the requirements of a prima facie case by stating that "[a] prima facie case of discrimination can be made by showing disability due to pregnancy, action based on that disability which adversely affects employment opportunities and that others were not similarly treated when suffering temporary disabilities." The court's assumption that a prima facie case was made by plaintiff appears to be only assumed for purposes of argument, since after *Gilbert*, pregnancy discrimination was not per se sex discrimination, and San Mateo's requirement of pregnancy leave for employees based on a case by case determination of incapacity to perform regular duties is not comparable to the adverse effect on employment opportunities found in the *Satty* case (accrued seniority voided) or the *Holthaus* case (employee discharged).

46. The portion of the City Manager Directive No. 7 (CMD-7) quoted by the court did not specify the characteristics of acceptable projects, but centralized the ultimate decision-making in the city manager's office. In his affidavit the city manager emphasized that acceptable projects should be "of high priority" and not " 'make work' or artificial." *Id.* at 1314.

47. *See* 417 U.S. at 496-97.

48. *See* 429 U.S. at 138.

49. 572 F.2d at 1314.

the city manager's stated policy.[50] The court then held that within the department the directive had been properly applied by the city manager in five of six cases[51] and since the plaintiff had not proved the city's reliance on the manager's directive to be a pretext the district court finding of no sex discrimination was not clearly erroneous.[52]

Due Process Claim

Although the due process clause of the fourteenth amendment[53] has been recognized as prohibiting the excessive burdening of the freedom of an individual to bear a child,[54] the *Roller* court held there was no due process violation when the city required the plaintiff to go on leave of absence after she no longer could perform her duties.[55] The court distinguished the case from *Cleveland Board of Education v. LaFleur*[56] by noting that 1) here, unlike *LeFleur,* the plaintiff did not contend she was able to perform her regular duties, and 2) here, the defendant's policy was to determine fitness on an individualized basis rather than to create a conclusive presumption that upon reaching a certain stage of pregnancy an employee would be unable to do her work.[57] The *Roller* court held that refusing to provide light duty for pregnant employees did not "unduly penalize a female for deciding to bear a child."[58]

D. Analysis

Roller limits the duty of employers to accommodate their pregnant employees' desire to maintain income while pregnant. Its precedential value is somewhat narrowed because the plaintiff's position was weak. She did not allege that she could perform her police duties and she did not claim that the city's failure to provide a special light duty project for her was due to sex discrimination.

50. *Id.* at 1315. Similarly, the instructions to the city doctor to recommend that plaintiff be removed from her duties was irrelevant, according to the court, since the terms of CMD-7 removed his right to authorize light duty.

51. *Id.*

52. *Id.*

53. The fourteenth amendment provides, in part "No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law . . . ."

54. *See* Cleveland Board of Education v. LaFleur, 414 U.S. 632, 640 (1974).

55. 572 F.2d at 1316.

56. 414 U.S. 632 (1974).

57. 572 F.2d at 1316.

58. *Id.* at 1316 *citing* LaFleur, 414 U.S. at 648.

LeFleur provided little support in the plaintiff's attempt to establish her right to a light duty assignment. Although *LaFleur* recognized that the right to bear a child was a protected freedom which could not be "needlessly, arbitrarily or capriciously burdened,"[59] the determination of Roller's incapacity was neither arbitrary nor capricious, and therefore her only claim was that the employer's policy was irrational and unnecessary to serve the city's interests. Police officers are ill suited to assert this position because courts have recognized that preserving public safety requires a vigorous police force;[60] thus the city's policy of discouraging light duty assignments took on an enhanced justification in this case.

The effect of the holding on other pregnant plaintiffs employed in strenuous jobs is problematical. When a pregnant employee concedes her inability to perform her duties an argument for light duty still remains. If the policy which mandates the maternity leave is not "constitutionally tailored" to promote readiness it might be struck down on equal protection grounds.[61] If the disability interferes with duties that are unlikely to arise or are so remote as to be "de minimis"[62] a mandatory disability leave policy might be discriminatory when it has a gender-based discriminatory effect and its elimination would not "undermine the essential nature of the [employer's] business."[63]

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59. 414 U.S. at 639.

60. *See* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976), where the court held that even state policemen in excellent health may be mandatorily retired at age fifty in order to "protect the public by assuring physical preparedness of its uniformed police." *Id.* at 315. *See also* Foley v. Connelie, 435 U.S. 291 (1978). "The office of a policeman is in no sense 'one of the common occupations of the community.' " Although Foley dealt with New York's law requiring citizenship for state police, the attitude that police must meet special standards is common. *Id.* at 298. *But see* MacLennan v. American Airlines, Inc., 440 F. Supp. 466 (E.D. Va. 1977). The *MacLennan* court held that an airline policy requiring a female flight attendant to take maternity leave as soon as she learned she was pregnant violates Title VII. *Id.* at 472. The court suggested that although flight attendants perform important safety duties in planned or unplanned evacuations, and F.A.A. regulations require a flight attendant to be prepared to perform his or her duties at all times, "the likelihood of [there] being a problem because of pregnancy-related disabilities is so small as to be de minimis." *Id.* at 471.

61. *See* Cook v. Arentzen, 14 E.P.D. ¶ 7544 at 4702 (4th Cir. 1977) (Applying rational basis equal protection analysis, the court struck down a Navy regulation providing for termination of officers who became pregnant). The court acknowledged that a pregnant officer might be less efficient and even unavailable for duty but noted that no other temporary disability automatically resulted in discharge. The court declined to consider the *LaFleur* due process issue. *Id.* at 4703 n.3.

62. *See* MacLennan v. American Airlines, 440 F. Supp. 466, 471 (E.D. Va. 1977).

63. *Id. MacLennan* states that the test is whether the duties are routine or emergency. *Id.*

The court dismissed Roller's arguments that earlier police department grants of light duty to males and recent willingness by the police department to recommend light duty for male officers indicated that the policy was discriminatorily applied, and restricted its inquiry to the city manager's conduct since his recent policy was instituted. The Ninth Circuit thereby permitted the defendant to shield the acts of middle and the lower echelon management from scrutiny and also to moot previous arguably discriminatory city practices insofar as plaintiff's claim of pretext was concerned.

By focusing entirely on the city manager's acts in enforcing the recent directive while ignoring the department heads' actions the court is permitting a department within an organization to shield it discriminatory practices behind a legitimate directive. It seems likely that specialized projects, suitable for modified duty, are proposed or created at the department level.[64] The city manager's role is apparently to approve a project, not to initiate one. If, therefore, a department head discriminatorily declines to suggest or promote a suitable project when a member of a class he disfavors becomes temporarily disabled discrimination may result. Such discrimination may be extremely difficult to prove in a department where previous discrimination in hiring has virtually eliminated one class from the workforce. When in one department there are no others, or only very few, of plaintiff's class, the court, seeking statistical significance, may focus on the aggregate grants of light duty. By not closely examining the particular departmental management, the court may permit the effects of past departmental discrimination to be compounded.

By focussing on the conduct of the city manager in enforcing the directive the court assists litigants in determining what evidence will be considered relevant. The approach of examining the conduct of the person with the ultimate authority is analytically sound only to the extent that all discretion resides in the same person. If necessary elements in the execution of the policy, such as proposing special projects or justifying their importance, or endorsing employees as qualified, depends on the discretion of department heads, then their conduct and attitude should be weighed.[65]

64. The record is silent on this question.

65. The plaintiff made no claim that she was discriminated against when her employer created no special light duty project for her. 572 F. 2d at 1315.

E. Conclusion

An employer may establish a disability leave policy which provides that when a pregnant employee can no longer perform the full scope of her duties, she must go on leave, if the same terms and conditions of employment are applicable to other employees who become disabled. Congress, in amending Title VII in 1978[66] and in rejecting the Supreme Court's holdings in *Geduldig* and *Gilbert* which provided that pregnancy discrimination is not *per se* sex discrimination, imposed no duty on employers to provide disability pay or medical insurance benefits to their pregnant employees. By defining sex discrimination to explicitly include "pregnancy, childbirth or related medical conditions,"[67] Congress forces an employer to treat an employee disabled due to pregnancy the same as an employee unable to work due to any other temporary disability.

The House Report, accompanying the 1978 Title VII amendments, specifically mentioned that "employer practices of transferring workers to lighter assignments" was an employment practice to be administered equally to pregnant and non-pregnant disabled workes based on their actual ability to perform their duties.[68] Although it will be lawful for employers to refuse to make light duty assignments available to temporarily disabled employees, where the employer makes a substantial contribution to an

66. Pregnancy discrimination was defined as per se sex discrimination by Senate Bill 995, passed by Congress on October 23, 1978 and signed by President Carter on October 31, 1978. The act adds to the definitional section of the Civil Rights Act of 1964 the following subsection:

> (k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth or related medical conditions; and women affected by pregnancy, childbirth or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 703(h) of this title shall be interpreted to permit otherwise. This sub-section shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: Provided, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

42 U.S.C. § 2000e(k) (1978).

67. *Id.*

68. H.R. Rep. No. 95-948, 95th Cong., 2d Sess. (1978), *cited in* 55 Lab. L. Rep. (CCH) ¶ 405 (1978).

employee's disability benefits plan, there will be an economic incentive to retain the employee at the workplace in some productive capacity. According to the House Report ninety percent of all disability plans provide for between fifteen and twenty-six weeks of benefits.[69] Employers of women who hold strenuous jobs in workplaces having these typical plans may either disburse these significant benefits to employees, or create light duty positions for those medically capable of some productive output. If an employer makes light duty assignments available to pregnant employees, he must treat disabled male and non-pregnant female employees the same to avoid reverse discrimination charges.

The 1978 Title VII amendments provide that initially, benefits may not be reduced by the employer to establish parity between males and females, but that one year after enactment, or upon the expiration of a collective-bargaining agreement, benefits may be reduced or the fraction of costs apportionable to the employees may be increased.[70] The ultimate effect of entitling pregnant employees to Title VII protection will depend upon the costs associated with nondiscriminatory benefits packages and the bargaining positions of the parties. Where state statutes impose a duty on employers to accommodate an employee's request for a less strenuous assignment during disability, and where state requirements do not operate to permit or require discrimination, they will continue to not be preempted by Title VII,[71] and may provide additional income protection for pregnant employees.

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69. *Id.* at ¶ 406.

70. S. 995, 95th Cong., 2d Sess. (enacted Oct. 31, 1978), provides in part:

> Until the expiration of a period of one year from the date of enactment of this Act, or, if there is an applicable collective-bargaining agreement in effect on the date of enactment of this Act if providing either by direct payment or by making contributions to a fringe benefit fund or insurance program, benefits in violation with this Act shall, in order to come into compliance with this Act, reduce the benefits of the compensation provided any employee on the date of enactment of this Act, either directly or by failing to provide sufficient contributions to a fringe benefit fund or insurance program: Provided, That where the costs of such benefits on the date of enactment of this Act are apportioned between employers and employees, the payments or contributions required to comply with this Act may be made by employers and employees in the same proportion: And provided further, That nothing in this section shall prevent the readjustment of benefits or compensation for reasons unrelated to compliance with this act.

71. 123 Cong. Rec. 15,038 (daily ed. Sept. 16, 1977) (remarks of Sen. Williams).